United Nations A/CN.4/L.918/Add.1

General Assembly

Distr.: Limited
27 June 2018

Original: English

International Law Commission
Seventieth Session
New York, 30 April–1 June and Geneva, 2 July–10 August 2018

Draft report of the International Law Commission on the work of its seventieth session

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Identification of customary international law

Addendum

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E. Text of the draft conclusions on identification of customary international law

2. Text of the draft conclusions and commentaries thereto

1. The text of the draft conclusions, together with commentaries thereto, adopted by the Commission on second reading, is reproduced below.

Identification of customary international law

General commentary

(1) The present draft conclusions concern the methodology for identifying rules of customary international law. They seek to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined. This is not only of concern to specialists in public international law: others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.

(2) As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries.

(3) Customary international law is unwritten law deriving from practice accepted as law. It remains an important source of public international law,[1] and can be an effective means for subjects of international law to regulate their behaviour. Customary international law is among the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, which refers, in subparagraph (b), to "international custom, as evidence of a general practice accepted as law".[2] This wording reflects the two constituent elements of customary international law: a general practice and its acceptance as law (the latter often referred to as *opinio juris*).

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[1] Some important fields of international law are still governed essentially by customary international law, with few if any applicable treaties. Even where there is a treaty in force, the rules of customary international law continue to govern questions not regulated by the treaty and continue to apply in relations with and among non-parties to the treaty. In addition, treaties may refer to rules of customary international law; and such rules may be taken account in treaty interpretation in accordance with article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 ("1969 Vienna Convention")). Moreover, it may sometimes be necessary to determine the law applicable at the time when certain acts occurred ("the intertemporal law"), which may be customary international law even if a treaty is now in force. In any event, a rule of customary international law may continue to exist and be applicable, separately from a treaty, even where the two have the same content and even among parties to the treaty (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 93–96, paras. 174–179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at pp. 47–48, para. 88).

[2] This wording was proposed by the Advisory Committee of Jurists, established by the League of Nations in 1920 to prepare a draft statute for the Permanent Court of International Justice; it was retained, without change, in the Statute of the International Court of Justice in 1945. While the drafting has been criticized as imprecise, the formula is nevertheless widely considered as capturing the essence of customary international law.

(4) The identification of customary international law is a matter on which there is a wealth of material, including case law and scholarly writings.[3] The draft conclusions reflect the approach adopted by States, as well as by international courts and organizations and most authors. Recognizing that the process for the identification of customary international law is not always susceptible to exact formulations, the draft conclusions aim to offer clear guidance without being overly prescriptive.

(5) The 16 draft conclusions are divided into seven parts. Part One deals with scope and purpose. Part Two sets out the basic approach to the identification of customary international law, the "two-element" approach. Parts Three and Four provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification: "a general practice" and "acceptance as law" (*opinio juris*). Part Five addresses certain categories of materials that are frequently invoked in the identification of rules of customary international law. Whereas rules of customary international law are usually binding on all States, Parts Six and Seven deal with two exceptional cases: the persistent objector rule; and particular customary international law (rules that apply only among a limited number of States).

Part One
Introduction

Part One, comprising a single draft conclusion, defines the scope of the draft conclusions, outlining their function and purpose.

Conclusion 1
Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

Commentary

(1) Draft conclusion 1 is introductory in nature. It provides that the draft conclusions concern the way in which rules of customary international law are to be determined, that is, the legal methodology for undertaking that exercise.

(2) The term "customary international law" is used throughout the draft conclusions, being in common use and most clearly reflecting the nature of this source of international law. Other terms that are sometimes found in legal instruments, in case law and in scholarly writings include "custom", "international custom", and "international customary law" as well as "the law of nations" and "general international law".[4]

(3) The reference to "rules" of customary international law in the present draft conclusions and commentaries includes rules of customary international law that may be referred to as "principles" because of their more general and more fundamental character.[5]

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[3] The present commentary does not contain references to scholarly writings in the field, though they may be useful (and were referred to extensively in the Special Rapporteur's reports). For a bibliography, including sections that correspond to issues covered by individual draft conclusions, as well as sections addressing customary international law in various fields, see annex II to the fifth report (A/CN.4/717/Add.1).

[4] Some of these terms may be used in other senses; in particular, "general international law" is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law. For a judicial discussion of the term "general international law" see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665, at p. 782 (separate opinion of Judge Donoghue, para. 2) and pp. 846–849 (separate opinion of Judge *ad hoc* Dugard, paras. 12–17).

[5] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at pp. 288–290, para. 79 ("the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context [of defining the applicable international law] 'principles' clearly means principles of law, that is, it also

(4) The terms "identify" and "determine" are used interchangeably in the draft conclusions and commentaries. The reference to determining the "existence and content" of rules of customary international law reflects the fact that while often the need is to identify both the existence and the content of a rule, in some cases it is accepted that the rule exists but its precise content is disputed. This may be the case, for example, where the question arises as to whether a particular formulation (usually set out in texts such as treaties or resolutions) does in fact correspond precisely to an existing rule of customary international law, or whether there are exceptions to a recognized rule of customary international law.

(5) Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules of customary international law. They do not, however, deal systematically with how such rules emerge, or how they change or terminate.

(6) A number of other matters fall outside the scope of the draft conclusions. First, they do not address the substance of customary international law: they are concerned only with the methodological issue of how rules of customary international law are to be identified.[6] Second, no attempt is made to explain the relationship between customary international law and other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice (international conventions, whether general or particular, and general principles of law); the draft conclusions touch on the matter only in so far as is necessary to explain how rules of customary international law are to be identified. Third, the draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations. Finally, the draft conclusions do not address the position of customary international law within national legal systems, including the question of a possible burden of proof of customary international law.

Part Two
Basic approach

Part Two sets out the basic approach to the identification of customary international law. Comprising two draft conclusions, it specifies that determining a rule of customary international law requires establishing the existence of two constituent elements: a general practice, and acceptance of that practice as law (*opinio juris*). This requires a careful analysis of the evidence for each element.

Conclusion 2
Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an inquiry into two distinct, yet related, questions: whether there is a general practice, and whether such general practice is accepted

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includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character"). Such principles of customary international law are distinct from "general principles of law" within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

[6] Thus, reference in these commentaries to particular decisions of courts and tribunals is made in order to illustrate the methodology of the decisions, not for their substance.

as law (that is, accompanied by *opinio juris*[7]). In other words, one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way. This methodology, the "two-element approach", underlies the draft conclusions and is widely supported by States, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist.[8]

(2) A general practice and acceptance of that practice as law (*opinio juris*) are the two constituent elements of customary international law; together they are the essential conditions for the existence of a rule of customary international law. The identification of such a rule thus involves a careful examination of available evidence to establish their presence in any given case. This has been confirmed, *inter alia*, in the case law of the International Court of Justice, which refers to "two conditions [that] must be fulfilled"[9] and has repeatedly laid down that "the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*".[10] To establish that a claim concerning the existence and/or the content of a rule of customary international law is well-founded thus entails a search for a practice that has gained such acceptance among States that it may be considered to be the expression of a legal right or obligation (namely, that it is required, permitted or prohibited as a matter of law).[11] The test must always be: is there a general practice that is accepted as law?

(3) Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist. In the *Colombian-Peruvian asylum case*, for example, the International Court of Justice considered that the facts relating to the alleged existence of a rule of (particular) customary international law disclosed

> so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.[12]

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[7] The Latin term has been retained in the draft conclusions and commentaries alongside "acceptance as law" because of its prevalence in legal discourse (including in the case law of the International Court of Justice), and also because it may capture better the particular nature of the subjective element of customary international law as referring to legal conviction and not to formal consent.

[8] The shared view of parties to a case is not sufficient; it must be ascertained that a general practice that is accepted as law actually exists. See also *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at pp. 97–98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

[9] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[10] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29–30, para. 27; and *North Sea Continental Shelf* (see footnote above), at p. 44, para. 77.

[11] For example, in the *Jurisdictional Immunities of the State* case, an extensive survey of the practice of States in the form of national legislation, judicial decisions, and claims and other official statements, which was found to be accompanied by *opinio juris*, served to identify the scope of State immunity under customary international law (*Jurisdictional Immunities of the State* (see footnote 10 above), at pp. 122–139, paras. 55–91).

[12] *Colombian-Peruvian asylum case, Judgment of 20 November 1950, I.C.J. Reports 1950*, p. 266, at p. 277.

(4) As draft conclusion 2 makes clear, the presence of only one constituent element does not suffice for the identification of a rule of customary international law. Practice without acceptance as law (*opinio juris*), even if widespread and consistent, can be no more than a non-binding usage, while a belief that something is (or ought to be) the law unsupported by practice is mere aspiration; it is the two together that establish the existence of a rule of customary international law.[13] While writers have from time to time sought to devise alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories have not been adopted by States or in the case law.

(5) The two-element approach is often referred to as "inductive", in contrast to possible "deductive" approaches by which rules might be ascertained other than by empirical evidence of a general practice and its acceptance as law (*opinio juris*). The two-element approach does not in fact preclude a measure of deduction as an aid, to be employed with caution, in the application of the two-element approach, in particular when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law,[14] or when concluding that possible rules of international law form part of an "indivisible regime".[15]

(6) The two-element approach applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of States and in the case law, and is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches each with its own approach to sources.[16] While the application in practice of the basic approach may well take into account the particular circumstances and context in which an alleged rule has arisen and operates,[17] the essential nature of customary international law as a general practice accepted as law (accompanied by *opinio juris*) must always be respected.

Conclusion 3
Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found.

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[13] In the *Right of Passage* case, for example, the Court found that there was nothing to show that the recurring practice of passage through Indian territory of Portuguese armed forces and armed police between Daman and the Portuguese enclaves in India, or between the enclaves themselves, was permitted or exercised as of right. The Court explained that: "Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at pp. 40–43). In *Legality of the Threat or Use of Nuclear Weapons*, the Court considered that: "The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 73). See also *Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), decision on preliminary motion based on lack of jurisdiction (child recruitment) of 31 May 2004*, Special Court for Sierra Leone, p. 13, para. 17.

[14] This appears to be the approach in *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 55–56, para. 101.

[15] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at p. 674, para. 139.

[16] See also conclusions of the work of the Study Group on fragmentation of international law, *Yearbook of the International Law Commission 2006*, vol. II (Part Two), para. 251 (1).

[17] See draft conclusion 3 below

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

Commentary

(1) Draft conclusion 3 concerns the assessment of evidence for the two constituent elements of customary international law.[18] It offers general guidance for the process of determining the existence and content of a rule of customary international law from the various pieces of evidence available at the time of the assessment, which reflects both the systematic and rigorous analysis required and the dynamic nature of customary international law as a source of international law.

(2) Paragraph 1 sets out an overarching principle that underlies all of the draft conclusions, namely that the assessment of any and all available evidence must be careful and contextual. Whether a general practice that is accepted as law (accompanied by *opinio juris*) exists must be carefully investigated in each case, in the light of the relevant circumstances.[19] Such analysis not only promotes the credibility of any particular decision, but also allows the two-element approach to be applied, with the necessary flexibility, in all fields of international law.

(3) The requirement that regard be had to the overall context reflects the need to apply the two-element approach while taking into account the subject matter that the alleged rule is said to regulate. This implies that in each case any underlying principles of international law that may be applicable to the matter ought to be taken into account.[20] Moreover, the type of evidence consulted (and consideration of its availability or otherwise) depends on the circumstances, and certain forms of practice and certain forms of evidence of acceptance as law (*opinio juris*) may be of particular significance, according to the context. For example, in the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that

> [i]n the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property]. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States

[18] The term "evidence" is used here as a broad concept relating to all the materials that may be considered as a basis for the identification of customary international law, not in any technical sense as used by particular courts or in particular legal systems.

[19] See also *North Sea Continental Shelf* (footnote 9 above), dissenting opinion of Judge Tanaka, at p. 175: "To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances."

[20] In the *Jurisdictional Immunities of the State* case, the International Court of Justice considered that the customary rule of State immunity derived from the principle of sovereign equality of States and, in that context, had to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory (*Jurisdictional Immunities of the State* (see footnote 10 above), at pp. 123–124, para. 57). See also *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* (footnote 4 above), separate opinion of Judge Donoghue (paras. 3–10). It has also been explained that "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at p. 76, para. 10).

> granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.[21]

(4) The nature of the rule in question may also be of significance when assessing evidence for the purpose of ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). In particular, where prohibitive rules are concerned (for example, the prohibition of torture) it may be difficult to find much affirmative State practice (as opposed to deliberate inaction[22]); cases involving such rules are more likely turn on evaluating whether the inaction is accepted as law.

(5) Given that conduct may be fraught with ambiguities, paragraph 1 further indicates that regard must be had to the particular circumstances in which any evidence is to be found; only then may proper weight be accorded to it. In the *United States Nationals in Morocco* case, for example, the International Court of Justice, in seeking to ascertain whether a rule of (particular) customary international law existed, said:

> There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position.[23]

Similarly, when considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government. The significance of a State's failure to protest will depend upon all the circumstances, but may be particularly significant where concrete action has been taken, of which that State is aware and which has an immediate negative impact on its interests. Practice of a State that goes against its clear interests or entails significant costs for it is more likely to reflect acceptance as law.

(6) Paragraph 2 states that to identify the existence and content of a rule of customary international law each of the two constituent elements must be found to be present, and explains that this calls for an assessment of evidence for each element. In other words, while practice and acceptance as law (*opinio juris*) together supply the information necessary for the identification of customary international law, two distinct inquiries are to be carried out. The constituent elements may be intertwined in fact (in the sense that

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[21] *Jurisdictional Immunities of the State* (see footnote 10 above), at p. 123, para. 55. In the *Navigational and Related Rights* case, where the question arose whether long-established practice of fishing for subsistence purposes (acknowledged by both parties to the case) has evolved into a rule of (particular) customary international law, the International Court of Justice observed that "the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant" (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 265–266, para. 141). The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has noted the difficulty of observing State practice on the battlefield: *Prosecutor v. Tadić, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995*, para. 99.

[22] On inaction as a form of practice see draft conclusion 6, below, and paragraph (3) of the commentary thereto.

[23] *Case concerning rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 176, at p. 200.

practice may be accompanied by a certain motivation), but each is conceptually distinct for purposes of identifying a rule of customary international law.

(7) Although customary international law manifests itself in instances of conduct that are accompanied by *opinio juris*, acts forming the relevant practice are not as such evidence of acceptance as law. Moreover, acceptance as law is to be sought with respect not only to those taking part in the practice but also to those in a position to react to it.[24] No simple inference of acceptance as law may thus be made from the practice in question; in the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature".[25]

(8) Paragraph 2 emphasizes that the existence of one element may not be deduced merely from the existence of the other, and that a separate inquiry needs to be carried out for each. Nevertheless, the paragraph does not exclude that the same material may be used to ascertain practice and acceptance as law (*opinio juris*). A decision by a national court, for example, could be relevant practice as well as indicate that its outcome is required under customary international law. Similarly, an official report issued by a State may serve as practice (or contain information as to that State's practice) as well as attest to the legal views underlying it. The important point remains, however, that the material must be examined as part of two distinct inquiries, to ascertain practice and to ascertain acceptance as law.

(9) While in the identification of a rule of customary international law the existence of a general practice is often the initial factor to be considered, and only then is an inquiry made into whether such general practice is accepted as law, this order of examination is not mandatory. Thus, the identification of a rule of customary international law may also begin with appraising a written text allegedly expressing a widespread legal conviction and then seeking to verify whether there is a general practice corresponding to it.

Part Three
A general practice

As stated in draft conclusion 2, above, the indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law (*opinio juris*) be ascertained. Part Three offers more detailed guidance on the first of these two constituent elements of customary international law, "a general practice". Also known as the "material" or "objective" element,[26] it refers to those instances of conduct that (when accompanied by acceptance as law) are creative, or expressive, of customary international law. A number of factors must be considered in evaluating whether a general practice does in fact exist.

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[24] See also paragraph (5) of the commentary to draft conclusion 9, below.

[25] *North Sea Continental Shelf* (see footnote 9 above), at p. 44, para. 76. In the *Lotus* case, the Permanent Court of International Justice likewise held that: "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty" (*The Case of the S.S. "Lotus", P.C.I.J., Series A*, No. 10 (1927), p. 28). See also draft conclusion 9, paragraph 2, below.

[26] Sometimes also referred to as *usus* (usage), but this may lead to confusion with "mere usage or habit", which is to be distinguished from customary international law: see draft conclusion 9, paragraph 2, below.

Conclusion 4
Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Commentary

(1) Draft conclusion 4 specifies whose practice is to be taken into account when determining the existence and content of rules of customary international law.

(2) Paragraph 1 makes clear that it is primarily the practice of States that is to be looked to in determining the existence and content of rules of customary international law: the material element of customary international law is indeed often referred to as "State practice".[27] Being the primary subjects of the international legal system and possessing a general competence, States play a pre-eminent role in the formation of customary international law, and it is principally their practice that has to be examined in identifying it. Indeed, in many cases, it will only be State practice that is relevant for determining the existence and content of rules of customary international law. As the International Court of Justice stated in *Military and Paramilitary Activities in and against Nicaragua*, in order "to consider what are the rules of customary international law applicable to the present dispute … it has to direct its attention to the practice and *opinio juris* of States".[28]

(3) The word "primarily" serves a dual purpose. In addition to emphasizing the primary role of State practice in the formation and expression of rules of customary international law, it serves to refer the reader to the other practice that may be relevant in this context, which is the subject of paragraph 2.

(4) Paragraph 2 indicates that "[i]n certain cases", the practice of international organizations also contributes to the formation and expression of rules of customary international law.[29] While international organizations often serve as arenas or catalysts for the practice of States, the paragraph deals with practice that is attributed to international organizations themselves, not practice of States acting within or in relation to them (which is attributed to the States concerned).[30] In those cases where the practice of international organizations themselves is of relevance (as described below), references in the draft conclusions and commentaries to the practice of States should be read as including, *mutatis mutandis*, the practice of international organizations.

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[27] State practice serves other important functions in public international law, including in relation to treaty interpretation, but these are not within the scope of the present draft conclusions.

[28] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 97, para. 183. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court similarly stated that "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States …" (*Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 10 above), at p. 29, para. 27); and in the *Jurisdictional Immunities of the State* case, the Court again confirmed that it is "State practice from which customary international law is derived" (*Jurisdictional Immunities of the State* (see footnote 10 above), at p. 143, para. 101).

[29] The term "international organizations" refers, in these draft conclusions, to organizations that are established by instruments governed by international law (usually treaties), and possess their own international legal personality. The term does not include non-governmental organizations.

[30] See draft conclusions 6, 10 and 12, below, which refer, *inter alia*, to the practice, and acceptance as law, of States within international organizations.

(5) International organizations are not States.[31] They are entities established and empowered by States (or by States and/or other international organizations) to carry out certain functions, and to that end have international legal personality, that is, they have their own rights and obligations under international law. The practice of international organizations in international relations[32] (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (*a*) whose subject matter falls within the mandate of the organizations, and/or (*b*) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties). The words "in certain cases" in paragraph 2 indeed serve to indicate that the practice of international organizations will not be relevant to the identification of all rules of customary international law, and further that it may be the practice of only some, not all, international organizations that is relevant.

(6) Within this framework, the practice falling under paragraph 2 arises most clearly where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States. This is the case, for example, for certain competences of the European Union. Practice within the scope of paragraph 2 may also arise where member States have not transferred exclusive competences, but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States. Thus the practice of international organizations when serving as treaty depositaries, in deploying military forces (for example, for peacekeeping), in administering territories, or in taking positions on the scope of the privileges and immunities of the organization and its officials, may contribute to the formation, or expression, of rules of customary international law in those areas.[33]

(7) At the same time, caution is required in assessing the weight of the practice of an international organization as part of a general practice. International organizations vary greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization is carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater weight it may have in relation to the formation, or expression, of rules of customary international law. Among other factors that may need to be considered in weighing the practice are: the nature of the organization; the nature of the organ whose

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[31] See also the articles on the responsibility of international organizations adopted by the Commission in 2011, paragraph (7) of the general commentary: "International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ('principle of speciality'). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound" (*Yearbook ... 2011*, vol. II (Part Two), p. 47). See also *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 178 ("The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights").

[32] "Established practice" of the organization (that is, practice forming part of the rules of the organization within the meaning of article 2, paragraph 1 (*j*), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations) is not within the scope of the present conclusions.

[33] In this vein, the Standard Terms and Conditions for loan, guarantee and other financing agreements of the European Bank for Reconstruction and Development and the General Conditions for Sovereign-backed Loans of the Asian Infrastructure Investment Bank both recognize that the sources of public international law that may be applicable in the event of dispute between the Bank and a party to a financing agreement include, *inter alia*, "… forms of international custom, including the practice of states *and international financial institutions* of such generality, consistency and duration as to create legal obligations" (European Bank for Reconstruction and Development, Standard Terms and Conditions (1 December 2012), Sect. 8.04(b)(vi)(C); Asian Infrastructure Investment Bank, General Conditions for Sovereign-backed Loans (1 May 2016), Sect. 7.04(vii)(c) (emphasis added)).

conduct is under consideration; whether the conduct is *ultra vires* the organization or organ; and whether the conduct is consonant with that of the member States of the organization.

(8) Paragraph 3 makes explicit that the conduct of entities other than States and international organizations — for example, non-governmental organizations and private individuals, but also transnational corporations and non-State armed groups — is neither creative nor expressive of customary international law. As such, their conduct does not contribute to the formation, or expression, of rules of customary international law, and may not serve as direct (primary) evidence of the existence and content of such rules. The paragraph recognizes, however, that such conduct may have an indirect role in the identification of customary international law, by stimulating or recording the practice and acceptance as law (*opinio juris*) of States and international organizations.[34] For example, the acts of private individuals may sometimes be relevant to the formation or expression of rules of customary international law, but only to the extent that States have endorsed or reacted to them.[35]

(9) Official statements of the International Committee of the Red Cross (ICRC), such as appeals for and memorandums on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of the ICRC may assist in identifying relevant practice. Such activities may thus contribute to the development and determination of customary international law, but they are not practice as such.[36]

Conclusion 5
Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

Commentary

(1) Although in their international relations States most frequently act through the executive branch, draft conclusion 5 explains that State practice consists of any conduct of the State, whatever the branch concerned and functions at issue. In accordance with the principle of the unity of the State, this includes the conduct of any organ of the State forming part of the State's organization and acting in that capacity, whether in exercise of executive, legislative, judicial or "other" functions, such as commercial activities or the giving of administrative guidance to the private sector.

(2) To qualify as State practice, the conduct in question must be "of the State". The conduct of any State organ is to be considered conduct of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. An organ includes any person or entity that has that status in accordance with the internal law of the State; the conduct of a person or entity otherwise empowered by the law of the State to exercise elements of governmental authority is also conduct "of the State", provided the person or entity is acting in that capacity in the particular instance.[37]

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[34] In the latter capacity their output may fall within the ambit of draft conclusion 14, below. The Commission has considered a similar point with respect to practice by "non-State actors" under its topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties": see draft conclusion 5, paragraph 2, adopted on second reading under that topic, above.

[35] See, for example, *Dispute regarding Navigational and Related Rights* (footnote 21 above), at pp. 265–266, para. 141.

[36] This is without prejudice to the significance of acts of the ICRC in exercise of specific functions conferred upon it, in particular by the 1949 Geneva Conventions for the protection of war victims.

[37] See articles 4 and 5 of the articles on the responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex. For the draft articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

(3) The relevant practice of States is not limited to conduct *vis-à-vis* other States or other subjects of international law; conduct within the State, such as a State's treatment of its own nationals, may also relate to matters of international law.

(4) State practice may be that of a single State or of two or more States acting together. Examples of practice of the latter kind may include joint action by several States patrolling the high seas to combat piracy or cooperating in launching a satellite into orbit. Such joint action is to be distinguished from action by international organizations.[38]

(5) In order to contribute to the formation and identification of rules of customary international law, practice must be known to other States (whether or not it is publicly available).[39] Indeed, it is difficult to see how confidential conduct by a State could serve such a purpose unless and until it is known to other States.

Conclusion 6
Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

Commentary

(1) Draft conclusion 6 indicates the types of conduct that are covered under the term "practice", providing examples thereof and stating that no form of practice has *a priori* primacy over another in the identification of customary international law. It refers to forms of practice as empirically verifiable facts and avoids, for present purposes, a distinction between an act and its evidence.

(2) Given that States exercise their powers in various ways and do not confine themselves only to some types of acts, paragraph 1 provides that practice may take a wide range of forms. While some have argued that it is only what States "do" rather than what they "say" that may count as practice for purposes of identifying customary international law, it is now generally accepted that verbal conduct (whether written or oral) may count as practice; indeed, practice may at times consist entirely of verbal acts, for example, diplomatic protests.

(3) Paragraph 1 further makes clear that inaction may count as practice. The words "under certain circumstances" seek to caution, however, that only deliberate abstention from acting may serve such a role: the State in question needs to be conscious of refraining from acting in a given situation, and it cannot simply be assumed that abstention from acting is deliberate. Examples of such omissions (sometimes referred to as "negative practice") may include abstaining from instituting criminal proceedings against foreign State officials; refraining from exercising protection in favour of certain naturalized persons; and abstaining from the use of force.[40]

(4) Paragraph 2 provides a list of forms of practice that are often found to be useful for the identification of customary international law. As the words "but are not limited to" emphasize, this is a non-exhaustive list: given the inevitability and pace of change, both

[38] See also draft conclusion 4, paragraph 2, above, and the commentary thereto.

[39] Or, in the case of particular customary international law, to at least one other State or a group of States (see draft conclusion 16, below).

[40] For illustrations, see *The Case of the S.S. "Lotus"* (footnote 25 above), at p. 28; *Nottebohm Case (second phase), Judgment of 6 April, 1955, I.C.J. Reports 1955*, p. 4, at p. 22; and *Jurisdictional Immunities of the State* (see footnote 10 above), at pp. 134–135, para. 77.

political and technological, it would be impractical to draw up an exhaustive list of all the forms that practice might take.[41] The forms of practice listed are no more than examples, which, moreover, may overlap (for example, "diplomatic acts and correspondence" and "executive conduct").

(5) The order in which the forms of practice are listed in paragraph 2 is not intended to be significant. Each of the forms listed is to be interpreted broadly to reflect the multiple and diverse ways in which States act and react. The expression "executive conduct", for example, refers comprehensively to any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals. The expression "legislative and administrative acts" similarly embraces the various forms of regulatory disposition effected by a public authority. The term "operational conduct 'on the ground'" includes law enforcement and seizure of property as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons. The words "conduct in connection with treaties" cover acts related to the negotiation and conclusion of treaties, as well as their implementation; by concluding a treaty a State may be engaging in practice in the domain to which the treaty relates, such as maritime delimitation agreements or host country agreements. The reference to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" likewise includes acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted within international organizations or at intergovernmental conferences, whatever their designation and whether or not they are legally binding. Whether any of these examples of forms of practice are in fact relevant in a particular case will depend on the specific rule under consideration and all the relevant circumstances.[42]

(6) Decisions of national courts at all levels may count as State practice[43] (though it is likely that greater weight will be given to the higher courts); decisions that have been overruled on the particular point are unlikely to be considered relevant. The role of decisions of national courts as a form of State practice is to be distinguished from their potential role as a "subsidiary means" for the determination of rules of customary international law.[44]

(7) Paragraph 2 applies *mutatis mutandis* to the forms of practice of international organizations in those cases where, in accordance with draft conclusion 4, paragraph 2, above, such practice contributes to the formation, or expression, of rules of customary international law.

(8) Paragraph 3 clarifies that no form of practice has a higher probative value than others in the abstract. In particular cases, however, as explained in the commentaries to draft conclusions 3 and 7 above, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context.

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[41] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II (Part Two), p. 368, para. 31; and document A/CN.4/710: Ways and means for making the evidence of customary international law more readily available: Memorandum by the Secretariat (2018).

[42] See paragraph (3) of the commentary to draft conclusion 3, above.

[43] See, for example, *Jurisdictional Immunities of the State* (footnote 10 above), at pp. 131–135, paras. 72–77; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium). Judgment, I.C.J. Reports 2002*, p. 3, at p. 24, para. 58. The term "national courts" may also include courts with an international element operating within one or more domestic legal systems, such as courts or tribunals with mixed national and international composition.

[44] See draft conclusion 13, paragraph 2, below. Decisions of national courts may also serve as evidence of acceptance as law (*opinio juris*), on which see draft conclusion 10, paragraph 2, below.

Conclusion 7
Assessing a State's practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

Commentary

(1) Draft conclusion 7 concerns the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice (which is the subject of draft conclusion 8, below). As the two paragraphs of draft conclusion 7 make clear, it is necessary to take account of and assess as a whole all available practice of the State concerned on the matter in question, including its consistency.

(2) Paragraph 1 states, first, that in seeking to determine the position of a particular State on the matter in question, account is to be taken of all available practice of that State. This means that the practice examined should be exhaustive (having regard to its availability) and include the relevant practice of all of the State's organs and all relevant practice of a particular organ. The paragraph also makes it clear that relevant practice is to be assessed not in isolation but as a whole; only then can the actual position of the State be determined.

(3) The need to assess available practice "as a whole" is illustrated by the *Jurisdictional Immunities of the State* case, in which the International Court of Justice took note of the fact that although the Hellenic Supreme Court had decided in one case that, by virtue of the "territorial tort principle", State immunity under customary international law did not extend to the acts of armed forces during an armed conflict, a different position was adopted by the Greek Special Supreme Court; by the Government of Greece when refusing to enforce the Hellenic Supreme Court's judgment, and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision. Assessing such practice "as a whole" led the Court to conclude "that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument" that State immunity under customary international law does not extend to the acts of armed forces during an armed conflict.[45]

(4) Paragraph 2 refers explicitly to situations where there is or appears to be inconsistent practice of a particular State. As just indicated, this may be the case where different organs or branches within the State adopt different courses of conduct on the same matter or where the practice of one organ varies over time. If in such circumstances a State's practice as a whole is found to be inconsistent, that State's contribution to the "general practice" element may be reduced.

(5) The words "may, depending on the circumstances" in paragraph 2 indicate that such assessment needs to be approached with caution, and the same conclusion would not necessarily be drawn in all cases. In the *Fisheries case*, for example, the International Court of Justice held that "too much importance need not be attached to the few uncertainties or contradictions, real or apparent … in Norwegian practice. They may be easily understood in the light of the variety of facts and conditions prevailing in the long period."[46] In this vein, for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ. Practice of organs of a central government will usually be more significant than that of constituent units of a federal State or political subdivisions of the State. The practice of the executive branch is often the most relevant on the international plane and thus has particular weight in

[45] *Jurisdictional Immunities of the State* (see footnote 10 above), at p. 134, para. 76, and p. 136, para. 83. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 1 above), at p. 98, para. 186.

[46] *Fisheries case, Judgment of 18 December 1951, I.C.J. Reports 1951*, p. 116, at p. 138.

connection with the identification of customary international law, though account may need to be taken of the constitutional position of the various organs in question.[47]

Conclusion 8
The practice must be general

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

Commentary

(1) Draft conclusion 8 concerns the requirement that the practice must be general; it seeks to capture the essence of this requirement and the inquiry that is needed in order to verify whether it has been met in a particular case.

(2) Paragraph 1 explains that the notion of generality, which refers to the aggregate of the instances in which the alleged rule of customary international law has been followed, embodies two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be "both extensive and virtually uniform":[48] it must be a "settled practice".[49] As is explained below, no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context.[50] In each case, however, the practice should be of such a character as to make it possible to discern a virtually uniform usage. Contradictory or inconsistent practice is to be taken into account in evaluating whether such a conclusion may be reached.[51]

(3) The requirement that the practice be "widespread and representative" does not lend itself to exact formulations, as circumstances may vary greatly from one case to another (for example, the frequency with which circumstances calling for action arise).[52] As regards diplomatic relations, for example, in which all States regularly engage, a practice may have to be widely exhibited, while with respect to international canals, of which there are very few, the amount of practice would necessarily be less. This is captured by the word "sufficiently", which implies that the necessary number and distribution of States taking part in the relevant practice (like the number of instances of practice) cannot be identified in the abstract. It is clear, however, that universal participation is not required: it is not necessary to show that all States have participated in the practice in question. The participating States should include those that had an opportunity or possibility of applying the alleged rule.[53] It is important that such States are representative, which needs to be

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[47] See, for example, *Jurisdictional Immunities of the State* (footnote 10 above), at p. 136, para. 83 (where the Court noted that "under Greek law" the view expressed by the Special Supreme Court prevailed over that of the Hellenic Supreme Court).

[48] *North Sea Continental Shelf* (see footnote 1 above), at p. 43, para. 74. A wide range of terms has been used to describe the requirement of generality, including by the International Court of Justice, without any real difference in meaning being implied.

[49] *Ibid.*, at p. 44, para. 77.

[50] See also draft conclusion 3, above.

[51] Divergences from the alleged rule may suggest that no rule exists or point, *inter alia*, to an admissible customary exception that has arisen; a change in a previous rule; a rule of particular customary international law; or the existence of one or more persistent objectors. It might also be relevant to consider the timing of the inconsistent practice, in particular whether it lay in the past, after which consistency prevailed.

[52] See also the judgment of 4 February 2016 of the Federal Court of Australia in *Ure v. The Commonwealth of Australia* [2016] FCAFC 8, para. 37 ("we would hesitate to say that it is impossible to demonstrate the existence of a rule of customary international [law] from a small number of instances of State practice. We would accept the less prescriptive proposition that as the number of instances of State practice decreases the task becomes more difficult").

[53] A relatively small number of States engaging in a certain practice might thus suffice if indeed such practice, as well as other States' inaction in response, is generally accepted as law (accompanied by *opinio juris*).

assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions.

(4) Thus, in assessing generality, an indispensable factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule ("specially affected States") have participated in the practice.[54] While in many cases all or virtually all States will be equally affected, it would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of coastal States and major shipping States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made.

(5) The requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist. For example, in the *Fisheries case*, the International Court of Justice found that "although the ten-mile rule has been adopted by certain States ... other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law".[55]

(6) In examining whether the practice is consistent it is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to "precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle [of customary international law] applicable to the particular case may appear".[56]

(7) At the same time, complete consistency in the practice of States is not required. The relevant practice needs to be virtually or substantially uniform, meaning that some inconsistencies and contradictions are not necessarily fatal to a finding of "a general practice". In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice held that:

> [i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect ... The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely

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[54] The International Court of Justice has said that "an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform", *North Sea Continental Shelf* (see footnote 9 above), at p. 43, para. 74. The term "specially affected States" should not be taken to refer to the relative power of States.

[55] *Fisheries case* (see footnote 46 above), at p. 131. A chamber of the International Court of Justice held in the *Gulf of Maine* case that where the practice demonstrates "that each specific case is, in the final analysis, different from all the others .... This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (see footnote 5 above), at p. 290, para. 81). See also, for example, *Colombian-Peruvian asylum case* (footnote 12 above), at p. 277 ("The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum ... that it is not possible to discern in all this any constant and uniform usage ... with regard to the alleged rule of unilateral and definitive qualification of the offence"); and *Interpretation of the air transport services agreement between the United States of America and Italy*, Advisory Opinion of 17 July 1965, United Nations, *Reports of International Arbitral Awards*, vol. XVI (Sales No. E/F.69.V.1), pp. 75—108, at p. 100 ("It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law").

[56] *The Case of the S.S. "Lotus"* (see footnote 25 above), at p. 21. See also *North Sea Continental Shelf* (footnote 9 above), at p. 45, para. 79; and *Prosecutor v. Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-A, Judgment (Appeals Chamber) of 28 May 2008*, Special Court for Sierra Leone, para. 406.

> rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules ... .[57]

(8) When inconsistency takes the form of breaches of a rule, this, too, does not necessarily prevent a general practice from being established. This is particularly so when the State concerned denies the violation and/or expresses support for the rule. As the International Court of Justice has observed:

> instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[58]

(9) Paragraph 2 refers to the time element, making clear that a relatively short period in which a general practice is followed is not, in and of itself, an obstacle to determining that a corresponding rule of customary international law exists. While a long duration may result in more extensive practice, time immemorial or a considerable or fixed duration of a general practice is not a condition for the existence of a customary rule.[59] The International Court of Justice confirmed this in the *North Sea Continental Shelf* cases, holding that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law".[60] As this passage makes clear, however, some period of time must elapse for a general practice to emerge; there is no such thing as "instant custom".

Part Four
Accepted as law (*opinio juris*)

Establishing that a certain practice is followed consistently by a sufficiently widespread and representative number of States does not in itself suffice in order to identify a rule of customary international law. Part Four concerns the second constituent element of customary international law, sometimes referred to as the "subjective" or "psychological" element, which requires that in each case, it is also necessary to be satisfied that there exists among States an acceptance as law (*opinio juris*) as to the binding character of the practice in question.

Conclusion 9
Requirement of acceptance as law (*opinio juris*)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Commentary

(1) Draft conclusion 9 seeks to encapsulate the nature and function of the second constituent element of customary international law, acceptance as law (*opinio juris*).

(2) Paragraph 1 explains that acceptance as law (*opinio juris*), as a constituent element of customary international law, refers to the requirement that the relevant practice must be undertaken with a sense of legal right or obligation, that is, it must be accompanied by a

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[57] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 98, para. 186.

[58] *Ibid.* See also, for example, *Prosecutor v. Sam Hinga Norman* (footnote 13 above), para. 51. The same is true when assessing a particular State's practice: see draft conclusion 7, above.

[59] In fields such as international space law or the law of the sea, for example, customary international law has sometimes developed rapidly.

[60] *North Sea Continental Shelf* (see footnote 9 above), at p. 43, para. 74.

conviction that it is permitted, required or prohibited by customary international law.[61] It is thus crucial to establish, in each case, that States have acted in a certain way because they felt or believed themselves legally compelled or entitled to do so by reason of a rule of customary international law: they must have pursued the practice as a matter of right, or submitted to it as a matter of obligation. As the International Court of Justice stressed in the *North Sea Continental Shelf* judgment:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[62]

(3) Acceptance as law (*opinio juris*) is to be distinguished from other, extralegal motives for action, such as comity, political expediency or convenience: if the practice in question is motivated solely by such other considerations, no rule of customary international law is to be identified. Thus in the *Colombian-Peruvian asylum* case the International Court of Justice declined to recognize the existence of a rule of customary international law where the alleged instances of practice were not shown to be, *inter alia*:

> exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. ... considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.[63]

(4) Seeking to comply with a treaty obligation as a treaty obligation, much like seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law: practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law.[64] A State may well recognize that it is bound by a certain obligation by force of both customary international law and treaty, but this would need to be proved. On the other hand, when States act in conformity with a treaty provision by which they are not bound, or apply conventional provisions in their relations with non-parties to the treaty, this may evidence the existence of acceptance as law (*opinio juris*) in the absence of any explanation to the contrary.

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[61] While acceptance of a certain practice as law (*opinio juris*) has often been described in terms of "a sense of legal obligation", draft conclusion 9 uses the broader language "a sense of legal right or obligation" as States have both rights and obligations under customary international law and they may act in the belief that they have a right or an obligation. The draft conclusion does not suggest that, where there is no prohibition, a State needs to point to a right to justify its action.

[62] *North Sea Continental Shelf* (see footnote 9 above), at p. 44, para. 77; see also paragraph 76 (referring to the requirement that States "believed themselves to be applying a mandatory rule of customary international law"). The Court has also referred, *inter alia*, to "a practice illustrative of belief in a kind of general right for States" (*Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 108, para. 206).

[63] *Colombian-Peruvian asylum case* (see footnote 12 above), at pp. 277 and 286. See also *The Case of the S.S. "Lotus"* (footnote 25 above), at p. 28 ("Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand ... there are other circumstances calculated to show that the contrary is true"); and *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at pp. 108–110, paras. 206–209.

[64] See, for example, *North Sea Continental Shelf* (footnote 9 above), at p. 43, para. 76. A particular difficulty may thus arise in ascertaining whether a rule of customary international law has emerged where a non-declaratory treaty has attracted virtually universal participation.

(5) Acceptance as law (*opinio juris*) is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it, who must be shown to have understood the practice as being in accordance with customary international law.[65] It is not necessary to establish that all States have recognized (accepted as law) the alleged rule as a rule of customary international law; it is broad and representative acceptance, together with no or little objection, that is required.[66]

(6) Paragraph 2 emphasizes that, without acceptance as law (*opinio juris*), a general practice may not be considered as creative, or expressive, of customary international law; it is mere usage or habit. In other words, practice that States consider themselves legally free either to follow or to disregard does not contribute to or reflect customary international law (unless the rule to be identified itself provides for such a choice).[67] Not all observed regularities of international conduct bear legal significance: diplomatic courtesies, for example, such as the provision of red carpets for visiting heads of State, are not accompanied by any sense of legal obligation and thus could not generate or attest to any legal duty or right to act accordingly.[68]

Conclusion 10
Forms of evidence of acceptance as law (*opinio juris*)

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Commentary

(1) Draft conclusion 10 concerns the evidence from which acceptance of a given practice as law (*opinio juris*) may be ascertained. It reflects the fact that acceptance as law may be made known through various manifestations of State behaviour, which should be

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[65] See *Military and Paramilitary Activities in and against Nicaragua* (footnote 1 above), at p. 109, para. 207 ("Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'" (citing the *North Sea Continental Shelf* judgment)).

[66] Thus, where "the members of the international community are profoundly divided" on the question of whether a certain practice is accompanied by acceptance as law (*opinio juris*), no such acceptance as law could be said to exist: see *Legality of the Threat or Use of Nuclear Weapons* (footnote 13 above), at p. 254, para. 67.

[67] In the *Right of Passage* case the International Court of Justice thus observed, with respect to the passage of armed forces and armed police, that "[t]he practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation" (*Case concerning Right of Passage over Indian Territory* (see footnote 13 above), at pp. 42–43). In the *Jurisdictional Immunities of the State* case, the International Court of Justice similarly held, in seeking to determine the content of a rule of customary international law, that, "[w]hile it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court" (*Jurisdictional Immunities of the State* (see footnote 10 above), at p. 123, para. 55).

[68] The International Court of Justice observed that indeed "[t]here are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" (*North Sea Continental Shelf* (see footnote 9 above), at p. 44, para. 77).

carefully assessed to determine whether, in any given case, they actually reflect a State's views on the current state of customary international law.

(2) Paragraph 1 sets forth the general proposition that acceptance as law (*opinio juris*) may be reflected in a wide variety of forms. States may express their recognition (or rejection) of the existence of a rule of customary international law in many ways. Such conduct indicative of acceptance as law supporting an alleged rule encompasses, as the subsequent paragraphs make clear, both statements and physical actions (as well as inaction) concerning the practice in question.

(3) Paragraph 2 provides a non-exhaustive list of forms of evidence of acceptance as law (*opinio juris*), including those most commonly resorted to for such purpose.[69] Such forms of evidence may also indicate lack of acceptance as law. There is some common ground between the forms of evidence of acceptance as law and the forms of State practice referred to in draft conclusion 6, paragraph 2 above;[70] in part, this reflects the fact that the two elements may at times be found in the same material (but, even then, their identification requires a separate exercise in each case[71]). In any event, statements are more likely to embody the legal conviction of the State, and may often be more usefully regarded as expressions of acceptance as law (or otherwise) rather than instances of practice.

(4) Among the forms of evidence of acceptance as law (*opinio juris*), an express public statement on behalf of a State that a given practice is permitted, prohibited or mandated under customary international law provides the clearest indication that the State has avoided or undertaken such practice (or recognized that it was rightfully undertaken or avoided by others) out of a sense of legal right or obligation. Similarly, the effect of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists.[72] Either way, such statements could be made, for example, in debates in multilateral settings; when introducing draft legislation before the legislature; as assertions made in written and oral pleadings before courts and tribunals; in protests characterizing the conduct of other States as unlawful; and in response to proposals for codification. They may be made individually or jointly with others.

(5) The other forms of evidence listed in paragraph 2 may also be of particular assistance in ascertaining the legal position of States in relation to certain practices. Among these, the term "official publications" covers documents published in the name of a State, such as military manuals and official maps, in which acceptance as law (*opinio juris*) may be found. Published opinions of government legal advisers may likewise shed light on a State's legal position, though not if the State declined to follow the advice. Diplomatic correspondence may include, for example, circular notes to diplomatic missions, such as those on privileges and immunities. National legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law, particularly where it has been specified (for example, in connection with the passage of the legislation) that it is mandated under or gives effect to customary international law. Decisions of national courts may also contain such statements when pronouncing upon questions of international law.

(6) Multilateral drafting and diplomatic processes may afford valuable and accessible evidence as to the legal convictions of States with respect to the content of customary international law, hence the reference to "treaty provisions" and to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". Their potential utility in the identification of rules of customary international law is examined in greater detail in draft conclusions 11 and 12, below.

(7) Paragraph 2 applies *mutatis mutandis* to the forms of evidence of acceptance of law (*opinio juris*) of international organizations.

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[69] See also document A/CN.4/710: Ways and means for making the evidence of customary international law more readily available: Memorandum by the Secretariat (2018).

[70] There are also differences between the lists, as they are intended to refer to the principal examples connected with each of the constituent elements.

[71] See draft conclusion 3, paragraph 2, above.

[72] At times the practice itself is accompanied by an express disavowal of legal obligation, such as when States pay compensation *ex gratia* for damage caused to foreign diplomatic property.

(8) Paragraph 3 provides that, under certain conditions, failure by States to react, within a reasonable time, may also, in the words of the International Court of Justice in the *Fisheries case*, "[bear] witness to the fact that they did not consider ... [a certain practice undertaken by others] to be contrary to international law".[73] Tolerance of a certain practice may indeed serve as evidence of acceptance as law (*opinio juris*) when it represents concurrence in that practice. For such a lack of open objection or protest to have this probative value, however, two requirements must be satisfied in the circumstances of each case in order to ensure that such inaction does not derive from causes unrelated to the legality of the practice in question.[74] First, it is essential that a reaction to the practice in question would have been called for:[75] this may be the case, for example, where the practice is one that affects — usually unfavourably — the interests or rights of the State failing or refusing to act.[76] Second, the reference to a State being "in a position to react" means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law. A State may also provide other explanations for its perceived silence.

Part Five
Significance of certain materials for the identification of customary international law

Commentary

(1) Various materials other than primary evidence of alleged instances of practice accepted as law (accompanied by *opinio juris*) may be consulted in the process of determining the existence and content of rules of customary international law. These commonly include written texts bearing on legal matters, in particular treaties, resolutions of international organizations and intergovernmental conferences, judicial decisions (of both international and national courts), and scholarly works. Such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer precise formulations to frame and guide an inquiry into its two constituent elements. Part Five seeks to explain the potential significance of these

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[73] *Fisheries case* (see footnote 46 above), at p. 139. See also *The Case of the S.S. "Lotus"* (footnote 25 above), at p. 29 ("the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice, that the French Government in the *Ortigia-Oncle-Joseph* case and the German Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law"); and *Priebke, Erich s/ solicitud de extradición, Case No. 16.063/94, Judgment of 2 November 1995*, Supreme Court of Justice of Argentina, Vote of Judge Gustavo A. Bossert, at p. 40, para. 90.

[74] See also, more generally, *North Sea Continental Shelf* (footnote 9 above), at p. 27, para. 33.

[75] The International Court of Justice has observed, in a different context, that "[t]he absence of reaction may well amount to acquiescence .... That is to say, silence may also speak, but only if the conduct of the other State calls for a response" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at pp. 50–51, para. 121). See also *Dispute regarding Navigational and Related Rights* (footnote 21 above), at pp. 265–266, para. 141 ("For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant").

[76] It may well be that a certain practice would be seen as affecting all or virtually all States.

materials, making clear that it is of critical importance to study carefully both the content of such materials and the context within which they were prepared.

(2) The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals,[77] a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification;[78] the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, the extent to which the Commission is engaged in progressive development of the law, and above all upon States' reception of its output.[79]

Conclusion 11
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;

(*b*) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Commentary

(1) Draft conclusion 11 concerns the significance of treaties for the identification of customary international law. The draft conclusion does not address conduct in connection with treaties as a form of practice, a matter covered in draft conclusion 6 above, nor does it directly concern the treaty-making process or draft treaty provisions, which may themselves give rise to State practice and evidence of acceptance as law (*opinio juris*) as indicated in draft conclusions 6 and 10 above.

(2) While treaties are, as such, binding only on the parties thereto, they "may have an important role to play in recording and defining rules deriving from custom, or indeed in

[77] See, for example, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 40, para. 51; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 56, para. 169; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (Appeals Chamber) of 13 December 2004*, International Criminal Tribunal for Rwanda, para. 518; *Dubai-Sharjah Border Arbitration* (1981), *International Law Reports*, vol. 91, pp. 543–701, at p. 575; and 2 BvR 1506/03, German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, para. 47.

[78] See the statute of the International Law Commission (1947), adopted by the General Assembly in resolution 174 (II) of 21 November 1947.

[79] Once the General Assembly has taken action in relation to a final draft of the Commission, such as by annexing it to a resolution and commending it to States, the output of the Commission may also fall to be considered under draft conclusion 12, below.

developing them".[80] Their provisions (and the processes of their adoption and application) may shed light on the content of customary international law.[81] Clearly expressed treaty provisions may offer particularly convenient evidence as to the existence or content of rules of customary international law when they are found to be declaratory of such rules. Yet the words "may reflect" caution that, in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content.

(3) The number of parties to a treaty may be an important factor in determining whether particular rules set forth therein correspond to customary international law; treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect.[82] But treaties that are not yet in force or which have not yet attained widespread participation may also be influential in certain circumstances, particularly where they were adopted without opposition or by an overwhelming majority of States.[83] In any case, the attitude of States not party to a widely ratified treaty, both at the time of its conclusion and subsequently, may also be of relevance.

(4) Paragraph 1 sets out three circumstances in which rules set forth in a treaty may be found to reflect customary international law, distinguished by the time when the rule of customary international law was (or began to be) formed. The use of the term "rule set forth in a treaty" seeks to indicate that a rule may not necessarily be contained in a single treaty provision, but could be reflected by two or more provisions read together.[84] The words "if it is established that" make it clear that establishing whether a conventional rule does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty: in each case the existence of the rule must be confirmed by practice (together with acceptance as law). It is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law.[85]

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[80] *Continental Shelf* (see footnote 10 above), at pp. 29–30, para. 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them"). Article 38 of the 1969 Vienna Convention refers to the possibility of "a rule set forth in a treaty … becoming binding upon a third State as a customary rule of international law, recognized as such".

[81] See *Jurisdictional Immunities of the State* (footnote 10 above), at p. 128, para. 66; "Ways and means for making the evidence of customary international law more readily available", *Yearbook … 1950*, vol. II (Part Two), p. 368, para. 29 ("not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law").

[82] See, for example, Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War, Ethiopia's Claim 4*, 1 July 2003, United Nations, *Reports of International Arbitral Awards*, vol. XXVI (Sales No. E/F.06.V.7), pp. 73–114, at pp. 86–87, para. 31 ("Certainly, there are important, modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law, and both Parties to this case agree. The mere fact that they have obtained nearly universal acceptance supports this conclusion" (footnote omitted)); and *Prosecutor v. Sam Hinga Norman* (see footnote 13 above) at paras. 17–20 (referring, *inter alia*, to the "huge acceptance, the highest acceptance of all international conventions" as indicating that the relevant provisions of the Convention on the Rights of the Child had come to reflect customary international law).

[83] See, for example, *Continental Shelf* (footnote 10 above), at p. 30, para. 27 ("it cannot be denied that the 1982 Convention [on the Law of the Sea — which was not then in force] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law").

[84] It may also be the case that a single provision only partly reflects customary international law.

[85] In the *North Sea Continental Shelf* cases, this consideration led to the disqualification of several of the invoked instances of State practice (*North Sea Continental Shelf* (see footnote 9 above), at p. 43, para. 76).

(5) Subparagraph (*a*) concerns the situation where it is established that a rule set forth in a treaty is declaratory of a pre-existing rule of customary international law.[86] In inquiring whether this is the case with respect to an alleged rule of customary international law, regard should first be had to the treaty text, which may contain an express statement on the matter.[87] The fact that reservations are expressly permitted to a treaty provision may suggest that the treaty provision does not reflect customary international law, but is not necessarily conclusive.[88] Such indications within the text, however, may be lacking, or may refer to the treaty in general rather than to any specific rule contained therein;[89] in such case, resort may be had to the treaty's preparatory work,[90] including any statements by States in the course of the drafting process that may disclose an intention to codify an existing rule of customary international law. If it is found that the negotiating States had indeed considered that the rule in question was a rule of customary international law, this would be evidence of acceptance as law (*opinio juris*), which would carry greater weight in the identification of the customary rule the larger the number of negotiating States. There

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[86] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 1 above), at pp. 46–47, para. 87.

[87] In the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaties Series*, vol. 78, No. 1021, p. 277), for example, the Parties "*confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law" (art. 1) (emphasis added); and the 1958 Geneva Convention on the High Seas contains the following preambular paragraph: "*Desiring* to codify the rules of international law relating to the high seas" (*ibid.*, vol. 450, No. 6465, at p. 82). A treaty may equally indicate that it embodies progressive development rather than codification; in the *Colombian-Peruvian asylum case*, for example, the International Court of Justice found that the preamble to the Montevideo Convention on Rights and duties of States of 1933 (League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19), which states that it modifies a previous convention (and the limited number of States that have ratified it), runs counter to the argument that the Convention "merely codified principles which were already recognized by … custom" (*Colombian-Peruvian asylum case* (see footnote 12 above), at p. 277).

[88] See also the Commission's Guide to Practice on Reservations to Treaties, guidelines 3.1.5.3 (Reservations to a provision reflecting a customary rule) and 4.4.2 (Absence of effect on rights and obligations under customary international law), *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10 and Add.1).

[89] The 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws (League of Nations, *Treaty Series*, vol. CLXXIX, No. 4137, p. 89), for example, provides that: "The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law" (art. 18). Sometimes a general reference is made to both codification and development: in the 1969 Vienna Convention, for example, the States parties express in the preamble their belief that "codification and progressive development of the law of treaties [are] achieved in the present Convention"; in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (General Assembly resolution 59/38 of 2 December 2004), the States parties consider in the preamble "that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law" and express their belief that the Convention "would contribute to the codification and development of international law and the harmonization of practice in this area". See also *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* and *Secretary of State for Foreign and Commonwealth Affairs* and *Libya v Janah*, United Kingdom Supreme Court, [2017] UKSC 62 (18 October 2017), para. 32.

[90] In examining in the *North Sea Continental Shelf* cases whether article 6 of the 1958 Convention on the Continental Shelf (United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311) reflected customary international law when the Convention was drawn up, the International Court of Justice held that "[t]he status of the rule in the Convention therefore depends mainly on the processes that led the [International Law] Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance [in maritime delimitation], and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule" (*North Sea Continental Shelf* (see footnote 9 above), at p. 38, para. 62). See also *Jurisdictional Immunities of the State* (footnote 10 above), at pp. 138–139, para. 89.

would, however, still remain a need to consider whether sufficiently widespread and representative, as well as consistent, instances of the relevant practice supported the existence of a rule of customary international law (as distinct from a treaty obligation). This is both because the fact that the parties assert that the treaty is declaratory of existing law is no more than one piece of evidence to that effect, and because the rule of customary international law underlying a treaty text may have changed or been superseded since the conclusion of the treaty. In other words, relevant practice will need to confirm, or exist in conjunction with, the *opinio juris*.

(6) Subparagraph (*b*) concerns the case where it is established that a general practice that is accepted as law (accompanied by *opinio juris*) has crystallized around a treaty rule elaborated on the basis of only a limited amount of State practice. In other words, the treaty rule has consolidated and given further definition to a rule of customary international law that was only emerging at the time when the treaty was being drawn up, thereby later becoming reflective of it.[91] Here, too, establishing that this is indeed the case requires an evaluation of whether the treaty formulation has been accepted as law and does in fact find support in a general practice.[92]

(7) Subparagraph (*c*) concerns the case where it is established that a rule set forth in a treaty has generated a new rule of customary international law.[93] This is a process that is not lightly to be regarded as having occurred. As the International Court of Justice explained in the *North Sea Continental Shelf* cases, for it to be established that a rule set forth in a treaty has produced the effect that a rule of customary international law has come into being:

> [i]t would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law. ... [A]n indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[94]

In other words, a general practice accepted as law (accompanied by *opinio juris*) "in the sense of the provision invoked" must be observed. Given that the concordant behaviour of parties to the treaty among themselves could presumably be attributed to the treaty

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[91] Even where a treaty provision could not eventually be agreed, it remains possible that customary international law has later evolved "through the practice of States on the basis of the debates and near-agreements at the Conference [where a treaty was negotiated]": *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 191–192, para. 44.

[92] See, for example, *Continental Shelf* (footnote 10 above), at p. 33, para. 34 ("It is in the Court's view incontestable that ... the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown *by the practice of States* to have become a part of customary law" (emphasis added)).

[93] As the International Court of Justice confirmed, "this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*North Sea Continental Shelf* (see footnote 9 above), at p. 41, para. 71). One example frequently cited is the Hague Regulations annexed to the 1907 Fourth Hague Convention respecting the Laws and Customs of War on Land: although these were prepared, according to the Convention, "to revise the general laws and customs of war" existing at that time (and thus did not codify existing customary international law), they later came to be regarded as reflecting customary international law (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 89).

[94] *North Sea Continental Shelf* (see footnote 9 above), at pp. 41–43, paras. 72 and 74 (cautioning, at para. 71, that "this result is not lightly to be regarded as having been attained"). See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 1 above), at p. 98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice").

obligation, rather than to acceptance of the rule in question as binding under customary international law, the practice of such parties in relation to non-parties to the treaty, and of non-parties in relation to parties or among themselves, will have particular value.

(8) Paragraph 2 seeks to caution that the existence of similar provisions in a number of bilateral or other treaties, thus establishing similar rights and obligations for a possibly broad array of States, does not necessarily indicate that a rule of customary international law is reflected in such provisions. While it may indeed be the case that such repetition attests to the existence of a corresponding rule of customary international law (or has given rise to it), it "could equally show the contrary" in the sense that States enter into treaties because of the absence of any rule or in order to derogate from it.[95] Again, an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule is required.

Conclusion 12
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Commentary

(1) Draft conclusion 12 concerns the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law. It provides that, while such resolutions, of themselves, can neither constitute rules of customary international law nor serve as conclusive evidence of their existence and content, they may sometimes have value in providing evidence of existing or emerging law.[96]

(2) As in draft conclusion 6, the word "resolution" refers to resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences, whatever their designation[97] and whether or not they are legally binding. Special attention should be paid in the present context to resolutions of the General Assembly, a plenary organ of the United Nations with virtually universal participation that may offer important evidence of the collective opinions of its members. Resolutions adopted by organs (or at conferences) with more limited membership may also be relevant, but their weight in identifying a rule of customary international law is likely to be less.

(3) Although resolutions of organs of international organizations (unlike resolutions of intergovermental conferences) emanate, strictly speaking, not from the States members but

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[95] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary").

[96] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 13 above), at pp. 254–255, para 70; *SEDCO Incorporated v. National Iranian Oil Company and Iran*, second interlocutory award, Award No. ITL 59-129-3 of 27 March 1986, *International Law Reports*, vol. 84, pp. 483–592, at p. 526.

[97] There is a wide range of designations, such as "declaration" or "declaration of principles".

from the organization, in the context of the present draft conclusion what is relevant is that they may reflect the collective expression of the views of such States: when they purport (explicitly or implicitly) to touch upon legal matters, the resolutions may afford an insight into the attitudes of the member States towards such matters. Much of what has been said of treaties in relation to draft conclusion 11, above, applies to resolutions; however, unlike treaties, resolutions are normally not legally binding documents, for the most part do not seek to embody legal rights and obligations, and generally receive less legal review than treaty texts. Like treaties, resolutions cannot be a substitute for the task of ascertaining whether there is in fact a general practice that is accepted as law (accompanied by *opinio juris*).

(4) Paragraph 1 makes clear that resolutions adopted by international organizations or at intergovernmental conferences cannot independently constitute rules of customary international law. In other words, the mere adoption of a resolution (or a series of resolutions) purporting to lay down a rule of customary international law does not create such law: it has to be established that the rule set forth in the resolution does in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*). There is no "instant custom" arising from such resolutions on their own account.[98]

(5) Paragraph 2 states, first, that resolutions may nevertheless assist in the determination of rules of customary international law by providing evidence of their existence and content. The word "may" seeks to caution that not all resolutions serve such a role. As the International Court of Justice has observed, resolutions "even if they are not binding … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".[99] This is particularly so when a resolution purports to be declaratory of an existing rule of customary international law, in which case it may serve as evidence of the acceptance as law of such a rule by those States supporting the resolution. In other words, "[t]he effect of consent to the text of such resolutions … may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".[100] Conversely, negative votes, abstentions or disassociations from a consensus, along with general statements and explanations of positions, may be evidence that there is no acceptance as law.

(6) Because the attitude of States towards a given resolution (or a particular rule set forth in a resolution), expressed by vote or otherwise, is often motivated by political or other non-legal considerations, ascertaining acceptance as law (*opinio juris*) from such resolutions must be done "with all due caution".[101] This is denoted by the word "may". In each case, a careful assessment of various factors is required in order to verify whether indeed the States concerned intended to acknowledge the existence of a rule of customary international law. As the International Court of Justice indicated in *Legality of the Threat or Use of Nuclear Weapons*, "it is necessary to look at [the resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[102] The precise wording used is the starting point in seeking to evaluate the legal significance of a resolution; reference to international law, and the choice (or avoidance) of particular terms in the text, including the preambular as well as the operative language, may be significant.[103] Also relevant are the

[98] See also para. (9) of the commentary to draft conclusion 8, above.

[99] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 13 above), at pp. 254–255, para. 70 (referring to General Assembly resolutions).

[100] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 100, para. 188. See also *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Final Award of 24 March 1982, *International Law Reports*, vol. 66, pp. 518–627, at pp. 601–602, para. 143.

[101] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 99, para. 188.

[102] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 13 above), at p. 255, para. 70.

[103] In resolution 96 (I) of 11 December 1946, for example, the General Assembly "*Affirm[ed]* that genocide is a crime under international law", language that suggests that the paragraph was intended to be declaratory of existing customary international law.

debates and negotiations leading up to the adoption of the resolution and especially explanations of vote and similar statements given immediately before or after adoption.[104] The degree of support for the resolution (as may be observed in the size of the majority and where there are negative votes or abstentions) is critical. Differences of opinion expressed on aspects of a resolution may indicate that no general acceptance as law (*opinio juris*) exists, at least on those aspects, and resolutions which attract negative votes or abstentions are unlikely to be regarded as reflecting customary international law.[105]

(7) Paragraph 2 further acknowledges that resolutions adopted by international organizations or at intergovernmental conferences, even when devoid of legal force of their own, may sometimes play an important role in the development of customary international law. This may be the case when, as with a treaty, a resolution (or a series of resolutions) provides inspiration and impetus for the growth of a general practice accepted as law (accompanied by *opinio juris*) conforming to its terms, or when it crystallizes an emerging rule.

(8) Paragraph 3 makes it clear that provisions of resolutions adopted by an international organization or at an intergovernmental conference cannot in and of themselves serve as conclusive evidence of the existence and content of rules of customary international law. This follows from the indication that, for the existence of a rule to be demonstrated, the *opinio juris* of States, as may be evidenced by a resolution, must be borne out by practice; other evidence is thus required, in particular to show whether the alleged rule is in fact observed in the practice of States.[106] A provision of a resolution cannot be evidence of a rule of customary international law if actual practice is absent, different or inconsistent.

Conclusion 13
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Commentary

(1) Draft conclusion 13 concerns the role of decisions of courts and tribunals, both international and national, as an aid in the identification of rules of customary international law. It should be recalled that decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as the above draft conclusions 6 and 10 indicate, they may serve as practice and/or evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means for the determination of rules of

[104] In the General Assembly, explanations of vote are often given upon adoption by a main committee, in which case they are not usually repeated in the plenary.

[105] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (footnote 13 above), at p. 255, para. 71 ("several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons").

[106] See, for example, *KAING Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment*, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber (3 February 2012), para. 194 ("The 1975 Declaration on Torture [resolution 3452 (XXX) of 9 December 1975, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time").

customary international law when they themselves examine the existence and content of such rules.

(2) Draft conclusion 13 follows closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, according to which, while decisions of the Court have no binding force except between the parties, judicial decisions are a subsidiary means (in French, *moyen auxiliaire*) for the determination of rules of international law, including rules of customary international law. The term "subsidiary means" denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law). The use of the term "subsidiary means" does not, and is not intended to, suggest that such decisions are not important in practice.

(3) Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in future case law. Other considerations might, depending on the circumstances, include the composition of the court or tribunal (and the particular expertise of its members); the size of the majority by which the decision was adopted; and the conditions under which the court or tribunal conducts its work. It needs to be borne in mind, moreover, that judicial pronouncements on customary international law do not freeze the law; rules of customary international law may have evolved since the date of a particular decision.

(4) Paragraph 1 refers to "international courts and tribunals", a term intended to cover any international body exercising judicial powers that is called upon to consider rules of customary international law. Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular position as the only standing international court of general jurisdiction.[107] In addition to the predecessor of the International Court of Justice, the Permanent Court of International Justice, the term "international courts and tribunals" includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Dispute Settlement Body. It also includes inter-State arbitral tribunals and other arbitral tribunals applying international law. The skills and the breadth of evidence usually at the disposal of international courts and tribunals may lend significant weight to their decisions, subject to the considerations mentioned in the preceding paragraph.

(5) For the purposes of this draft conclusion, the term "decisions" includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions may shed light on the decision and may discuss points not covered in the decision of the court or tribunal, but they need to be approached with caution since they reflect the viewpoint of the individual judge and may set out points not accepted by the court or tribunal.

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[107] Although there is no hierarchy of international courts and tribunals, decisions of the International Court of Justice are often regarded as authoritative by other courts and tribunals. See, for example, *Jones and Others v. the United Kingdom*, Application nos. 34356/06 and 40528/06, European Court of Human Rights, ECHR 2014, para. 198; *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at paras. 133–134; and *Japan — Taxes on Alcoholic Beverages*, WTO Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, sect. D.

(6) Paragraph 2 concerns decisions of national courts (also referred to as domestic or municipal courts).[108] The distinction between international and national courts is not always clear-cut; in these draft conclusions, the term "national courts" includes courts with an international composition operating within one or more domestic legal systems, such as "hybrid" courts and tribunals involving mixed national and international composition and jurisdiction.

(7) Some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law. This is reflected in the different wording of paragraphs 1 and 2, in particular the use of the words "[r]egard may be had, as appropriate" in paragraph 2. National courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective. Unlike most international courts, national courts sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States.[109]

Conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Commentary

(1) Draft conclusion 14 concerns the role of teachings (in French, *doctrine*) in the identification of rules of customary international law. Following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as a subsidiary means (*moyen auxiliaire*) for determining rules of customary international law, that is to say, when ascertaining whether there is a general practice that is accepted as law (accompanied by *opinio juris*). The term "teachings", often referred to as "writings", is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials.

(2) As with decisions of courts and tribunals, referred to above in draft conclusion 13, writings are not themselves a source of international law, but may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that teachings may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law.

(3) There is need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies: this is reflected in the words "may serve as". First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential; the United States Supreme Court in the *Paquete Habana Case* referred to:

> the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the

[108] On decisions of national courts as a subsidiary means for the determination of rules of customary international law see, for example, *Mohammed and others v. Ministry of Defence*, United Kingdom Supreme Court, [2017] UKSC 2 (17 January 2017), paras. 149–151 (Lord Mance).

[109] See also "Ways and means for making the evidence of customary international law more readily available", *Yearbook ... 1950*, vol. II (Part Two), p. 370, para. 53.

speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[110]

(4) The term "publicists", which comes from the Statute of the International Court of Justice, covers all those whose writings may elucidate questions of international law. While most such writers will, in the nature of things, be specialists in public international law, others are not excluded. The reference to "the most highly qualified" publicists emphasizes that attention ought to be paid to the writings of those who are eminent in the field. In the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it. The reference to publicists "of the various nations" highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages when identifying customary international law.

(5) The products of international bodies engaged in the codification and development of international law may provide a useful resource in this regard.[111] Such collective bodies include the Institute of International Law (*Institut de droit international*) and the International Law Association, as well as international expert bodies in particular fields. The value of each output needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others.

Part Six
Persistent objector

Part Six comprises a single draft conclusion, on the persistent objector rule.

Conclusion 15
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Commentary

(1) Rules of customary international law, "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".[112] Nevertheless, when a State has persistently objected to an *emerging* rule of customary international law, and maintains its objection after the rule has crystallized, that rule is not opposable to it. This is sometimes referred to as the persistent objector "rule" or "doctrine" and not infrequently arises in connection with the identification of rules of customary international law. As the draft conclusion seeks to convey, the invocation of the persistent objector rule is subject to stringent requirements.

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[110] *The Paquete Habana and The Lola*, US Supreme Court 175 US 677 (1900), at p. 700. See also *The Case of the S.S. "Lotus"* (footnote 25 above), at pp. 26 and 31.

[111] The special consideration to be given to the output of the International Law Commission is described in paragraph (2) of the general commentary to the present Part (Part Five) above.

[112] *North Sea Continental Shelf* (see footnote 9 above), at pp. 38–39, para. 63. This is true of rules of "general" customary international law, as opposed to "particular" customary international law (on which see draft conclusion 16, below).

(2) The persistent objector is to be distinguished from a situation where the objection of a significant number of States to the formation of a new rule of customary international law prevents its crystallization altogether (because there is no general practice accepted as law).[113]

(3) A State objecting to an emerging rule of customary international law by arguing against it or engaging in an alternative practice may adopt one or both of two stances: it may seek to prevent the rule from coming into being; and/or it may aim to ensure that, if it does emerge, the rule will not be opposable to it. An example would be the opposition of certain States to the then-emerging rule permitting the establishment of a maximum 12-mile territorial sea. Such States may have wished to consolidate a three-, four- or six-mile territorial sea as a general rule, but in any event were not prepared to have wider territorial seas enforced against them.[114] If a rule of customary international law is found to have emerged, it will be for the State concerned to establish the right to benefit from persistent objector status.

(4) The persistent objector rule is not infrequently invoked and recognized, both in international and domestic case law[115] as well as in other contexts.[116] While there are differing views, the persistent objector rule is widely accepted by States and writers as well as by scientific bodies engaged in international law.[117]

(5) Paragraph 1 makes it clear that the objection must have been made while the rule in question was in the process of formation. The timeliness of the objection is critical: the State must express its opposition before a given practice has crystallized into a rule of customary international law, and its position will be best assured if it did so at the earliest possible moment. While the line between objection and violation may not always be an easy one to draw, there is no such thing as a subsequent objector rule: once the rule has come into being, an objection will not avail a State wishing to exempt itself.

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[113] See, for example, *Entscheidungen des Bundesverfassungsgerichts* (German Federal Constitutional Court), vol. 46 (1978), Judgment of 13 December 1977, 2 BvM 1/76, No. 32, pp. 34–404, at pp. 388–389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the International Court of Justice in the Norwegian *Fisheries case* ...; instead, the existence of a corresponding general rule of international law cannot at present be assumed").

[114] In due course, and as part of an overall package on the law of the sea, States did not in fact maintain their objections. While the ability effectively to preserve a persistent objector status over time may sometimes prove difficult, this does not call into question the existence of the rule reflected in draft conclusion 15.

[115] See, for example, the *Fisheries case* (footnote 46 above), at p. 131; *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02, paras. 48 and 49; *Sabeh El Leil v. France* [GC], no. 34869/05, European Court of Human Rights, 29 June 2011, para. 54; WTO Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted 21 November 2006, at p. 335, footnote 248; and *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699; 1992 U.S. App., at p. 715, para. 54.

[116] See, for example, the intervention by Turkey in 1982 at the Third United Nations Conference on the Law of the Sea, document A/CONF.62/SR.189, p. 76, para. 150 (available from http://legal.un.org/diplomaticconferences/lawofthesea-1982/Vol17.html); United States Department of Defense, *Law of War Manual*, Office of General Counsel, Washington D.C., December 2016, at pp. 29–34, sect. 1.8 (Customary international law), in particular at p. 30, para. 1.8 ("Customary international law is generally binding on all States, but States that have been persistent objectors to a customary international law rule during its development are not bound by that rule") and p. 34, para. 1.8.4.

[117] The Commission itself recently referred to the rule in its Guide to Practice on Reservations to Treaties, where it stated that "a reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law" (see paragraph (7) of the commentary to guideline 3.1.5.3, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10/Add.1)).

(6) If a State establishes itself as a persistent objector, the rule is not opposable to it for so long as it maintains the objection; the expression "not opposable" is used in order to reflect the exceptional position of the persistent objector. As the paragraph further indicates, once an objection is abandoned (as it may be at any time, expressly or otherwise), the State in question becomes bound by the rule.

(7) Paragraph 2 clarifies the stringent requirements that must be met for a State to establish and maintain persistent objector status *vis-à-vis* a rule of customary international law. In addition to being made before the practice crystallizes into a rule of law, the objection must be clearly expressed, meaning that non-acceptance of the emerging rule or the intention not to be bound by it must be unambiguous.[118] There is, however, no requirement that the objection be made in a particular form. A clear verbal objection, either in written or oral form, as opposed to physical action, will suffice to preserve the legal position of the objecting State.

(8) The requirement that the objection be made known to other States means that the objection must be communicated internationally; it cannot simply be voiced internally. It is for the objecting State to ensure that the objection is indeed made known to other States.

(9) The requirement that the objection be maintained persistently applies both before and after the rule of customary international law has emerged. Assessing whether this requirement has been met needs to be done in a pragmatic manner, bearing in mind the circumstances of each case. The requirement signifies, first, that the objection should be reiterated when the circumstances are such that a restatement is called for (that is, in circumstances where silence or inaction may reasonably lead to the conclusion that the State has given up its objection). It is clear, however, that States cannot be expected to react on every occasion, especially where their position is already well known. Second, such repeated objections must be consistent overall, that is, without significant contradictions.

(10) Paragraph 3 provides expressly that draft conclusion 15 is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*). The commentary to draft conclusion 1 already makes clear that all of the present draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations.[119]

Part Seven
Particular customary international law

Part Seven consists of a single draft conclusion, dealing with particular customary international law (sometimes referred to as "regional custom" or "special custom"). While rules of general customary international law are binding on all States, rules of particular customary international law apply among a limited number of States. Even though they are not frequently encountered, they can play a significant role in inter-State relations, accommodating differing interests and values peculiar to only some States.[120]

Conclusion 16
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

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[118] See, for example, *C v. Director of Immigration and another*, Hong Kong Court of Appeal, [2011] HKCA 159, CACV 132-137/2008 (2011), at para. 68 ("Evidence of objection must be clear").

[119] See paragraph (5) of the commentary to draft conclusion 1, above.

[120] It is not to be excluded that such rules may evolve, over time, into rules of general customary international law.

Commentary

(1) That rules of customary international law that are not general in nature may exist is undisputed. The case law of the International Court of Justice confirms this, having referred, *inter alia*, to customary international law "particular to the Inter-American Legal system"[121] or "limited in its impact to the African continent as it has previously been to Spanish America",[122] "a local custom",[123] and customary international law "of a regional nature".[124] Cases where the identification of such rules was considered include the *Colombian-Peruvian asylum case*[125] and the *Right of Passage* case.[126] The term "particular customary international law" refers to these rules in contrast to rules of customary international law of general application. It is used in preference to "particular custom" to emphasize that the draft conclusion is concerned with rules of law, not mere customs or usages; there may well be "local customs" among States that do not amount to rules of international law.[127]

(2) Draft conclusion 16 has been placed at the end of the set of draft conclusions since the preceding draft conclusions generally apply also in respect of the determination of rules of particular customary international law, except as otherwise provided in the present draft conclusion. In particular, the two-element approach applies, as described in the present commentary.[128]

(3) Paragraph 1, which is definitional in nature, explains that particular customary international law applies only among a limited number of States. It is to be distinguished from general customary international law, that is, customary international law that in principle applies to all States. A rule of particular customary international law itself thus creates neither obligations nor rights for third States.[129]

(4) Rules of particular customary international law may apply among various types of groupings of States. Reference is often made to customary rules of a regional nature, such as those "peculiar to Latin-American States" (the institution of diplomatic asylum commonly being cited).[130] Particular customary international law may cover a smaller geographical area, such as a sub-region, or even bind as few as two States. In the *Right of Passage* case the International Court of Justice explained that:

> It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[131]

Cases in which assertions of such rules of particular customary international law have been examined have concerned, for example, a right of access to enclaves in foreign territory;[132]

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121 *Military and Paramilitary Activities in and against Nicaragua* (see footnote 1 above), at p. 105, para. 199.

122 *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 21.

123 *Case concerning rights of nationals of the United States of America in Morocco* (see footnote 23 above), at p. 200; and *Case concerning Right of Passage over Indian Territory* (see footnote 13 above), at p. 39.

124 *Dispute regarding Navigational and Related Rights* (see footnote 21 above), at p. 233, para. 34.

125 *Colombian-Peruvian asylum case* (see footnote 12 above).

126 *Case concerning Right of Passage over Indian Territory* (see footnote 13 above).

127 See also draft conclusion 9, paragraph 2, above.

128 The International Court of Justice has treated particular customary international law as falling within Article 38, paragraph 1 (b), of its Statute: see *Colombian-Peruvian asylum case* (footnote 12 above), at pp. 276–277.

129 The position is similar to that set out in the provisions of the 1969 Vienna Convention concerning treaties and third States (Part III, sect. 4).

130 *Colombian-Peruvian asylum case* (see footnote 12 above), at p. 276.

131 *Case concerning Right of Passage over Indian Territory* (see footnote 13 above), at p. 39.

132 *Ibid.*, p. 6.

a co-ownership (condominium) of historic waters by three coastal States;[133] a right to subsistence fishing by nationals inhabiting a river bank serving as a border between two riparian States;[134] a right of cross-border/international transit free from immigration formalities;[135] and an obligation to reach agreement in administering the generation of power on a river constituting a border between two States.[136]

(5) While some geographical relationship usually exists between the States among which a rule of particular customary international law applies, that may not necessarily always be the case. The expression "whether regional, local or other" is intended to acknowledge that although particular customary international law is mostly regional, subregional or local, there is no reason in principle why a rule of particular customary international law should not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest, whether established by treaty or otherwise.

(6) Paragraph 2 addresses the substantive requirements for identifying a rule of particular customary international law. In essence, determining whether such a rule exists consists of a search for a general practice prevailing among the States concerned that is accepted by them as governing their relations *inter se*. The International Court of Justice in the *Colombian-Peruvian asylum* case provided guidance on this matter, holding with respect to the argument by Colombiaas to the existence of a "regional or local custom particular to Latin-American States" that:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".[137]

(7) The two-element approach requiring both a general practice and its acceptance as law (*opinio juris*) thus also applies in the case of identifying rules of particular customary international law. In the case of particular customary international law, however, the practice must be general in the sense that it is a consistent practice "among the States concerned", that is, all the States among which the rule in question applies. Each of these States must have accepted the practice as law among themselves. In this respect, the application of the two-element approach is stricter in the case of rules of particular customary international law.

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[133] See the claim by Honduras in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992*, p. 351, at p. 597, para. 399.

[134] *Dispute regarding Navigational and Related Rights* (see footnote 21 above), at pp. 265–266, paras. 140–144; see also Judge Sepúlveda-Amor's Separate Opinion, at pp. 278–282, paras. 20–36.

[135] *Nkondo v. Minister of Police and Another*, South African Supreme Court, 1980 (2) SA 894 (O), 7 March 1980, *International Law Reports*, vol. 82, pp. 358–375, at pp. 368–375 (Smuts J. holding that: "There was no evidence of long standing practice between the Republic of South Africa and Lesotho which had crystallized into a local customary right of transit free from immigration formalities" (at p. 359)).

[136] *Kraftwerk Reckingen AG v. Canton of Zurich and others*, Appeal Judgment, BGE 129 II 114, ILDC 346 (CH 2002), 10 October 2002, Switzerland, Federal Supreme Court [BGer]; Public Law Chamber II, para. 4.

[137] *Colombian-Peruvian asylum case* (see footnote 12 above), at pp. 276–277.

United Nations A/CN.4/L.919/Add.1

General Assembly

Distr.: Limited
11 July 2018

Original: English

International Law Commission
Seventieth session
New York, 30 April–1 June, and Geneva, 2 July–10 August 2018

Draft report of the International Law Commission on the work of its seventieth session

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Chapter VI
Protection of the atmosphere

Addendum

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C. Text of the draft guidelines on the protection of the atmosphere, together with the preamble, adopted by the Commission on first reading

1. Text of the draft guidelines, together with preamble

1. The text of the draft guidelines on the protection of the atmosphere, together with preamble, adopted by the Commission on first reading is reproduced below.

Preamble

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Noting the close interaction between the atmosphere and the oceans,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

Aware of the special situation and needs of developing countries,

Aware also, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Recalling that the present draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

Guideline 1
Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Guideline 2
Scope of the guidelines

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

Guideline 3
Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

Guideline 4
Environmental impact assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Guideline 5
Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Guideline 6
Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

Guideline 7
Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Guideline 8 [5][1]
International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Guideline 9
Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the

[1] The draft guideline was renumbered during the sixty-eighth session of the Commission. The original number appears in square brackets.

principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

Guideline 10
Implementation

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.

2. States should endeavour to give effect to the recommendations contained in the present draft guidelines.

Guideline 11
Compliance

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.

2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:

(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

Guideline 12
Dispute settlement

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.

2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts

2. Text of the draft guidelines, together with preamble, and commentaries thereto

2. The text of the draft guidelines, together with the preamble, and commentaries thereto, adopted by the Commission on first reading at its seventieth session is reproduced below.

Protection of the atmosphere

General commentary

The Commission recognizes the importance of being fully engaged with the international community's present-day needs. It is acknowledged that both the human and natural environments can be adversely affected by certain changes in the condition of the atmosphere mainly caused by the introduction of harmful substances, causing transboundary air pollution, ozone depletion, as well as changes in the atmospheric conditions leading to climate change. The Commission seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere. In doing so, the Commission does not desire to interfere with relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change, seek to "fill" gaps in treaty regimes nor to impose on current treaty regimes legal rules or legal principles not already contained therein.

Preamble

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Noting the close interaction between the atmosphere and the oceans,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

Aware of the special situation and needs of developing countries,

Aware also, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Recalling that the present draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

Commentary

(1) On previous occasions, preambles have been prepared once the Commission has concluded work on the particular topic.[2] In the present case, however, due to the way in

[2] In the past, the Commission has generally presented to the General Assembly an outcome of its work without a draft preamble, leaving its elaboration to States. However, there have also been precedents during which the Commission has prepared such preambles. This was the case, for instance, with respect to the two draft conventions on the elimination of future statelessness (1954), *Yearbook ... 1954*, vol. II, para. 25, and on the reduction of the future statelessness (1954), *Yearbook ... 1954*, vol. II, para. 25; the model rules on arbitral procedures (1958), *Yearbook ... 1958*, vol. II, para. 22 (the preamble reflected fundamental rules for an undertaking to arbitrate); the draft articles on the nationality of natural persons in relation to the succession of States (1999), *Yearbook ... 1999*, vol. II (Part Two), para. 47 (reproduced in General Assembly resolution 55/153, annex, of 12 December 2000); the draft articles on prevention of transboundary harm from hazardous activities (2001), *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 97 (reproduced in General Assembly resolution 62/68, annex, of 6 December 2007); the guiding principles applicable to unilateral declarations of States capable of creating legal obligations (2006), *Yearbook ... 2006*, vol. II (Part Two), para. 176; the draft principles on the allocation of loss in the case of transboundary harm

which the guidelines concerning the topic have evolved, with language from some guideline proposals being formulated as preambular text, a draft preamble has been elaborated during the drafting process. The Commission, for example, referred draft guideline 3 (on the common concern of humankind), as contained in the Special Rapporteur's second report,[3] to the Drafting Committee, for consideration in the context of a possible preamble. Should the case warrant, additional preambular paragraphs may be added as the work progresses in the future.

(2) The preamble seeks to provide a contextual framework for the draft guidelines. The first preambular paragraph is overarching in acknowledging the essential importance of the atmosphere for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. The atmosphere is the Earth's largest single and one of the most important natural resources. It was listed as a natural resource — along with mineral, energy and water resources — by the former Committee on Natural Resources of the Economic and Social Council,[4] as well as in the 1972 Declaration of the United Nations Conference on the Human Environment (hereinafter, "Stockholm Declaration")[5] and in the 1982 World Charter for Nature.[6] The atmosphere provides renewable "flow resources" essential for human, plant and animal survival on the planet, and it serves as a medium for transportation and communication. The atmosphere was long considered to be non-exhaustible and non-exclusive, since it was assumed that everyone could benefit from it without depriving others. That view is no longer held.[7] It must be borne in mind that the atmosphere is a limited resource with limited assimilation capacity.

(3) The second preambular paragraph addresses the functional aspect of the atmosphere as a medium through which transport and dispersion of polluting and degrading substances occur. The Commission considered it appropriate to refer to this functional aspect in the preamble. This decision reflects a concern that the inclusion of the functional aspect as part of the definition, as originally proposed, may suggest that this transport and dispersion is desirable, which is not the intention of the Commission. Long-range transboundary movement of polluting and degrading substances is recognized as one of the major problems of the present-day atmospheric environment,[8] with the Arctic region being

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arising out of hazardous activities (2006), *Yearbook ... 2006*, vol. II (Part Two), para. 66 (reproduced in General Assembly resolution 61/36, annex, of 4 December 2006); and the articles on the law of transboundary aquifers (2008), *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

[3] A/CN.4/681 and Corr.1, para. 3.

[4] The inclusion of "atmospheric resources" among "other natural resources" by the former Committee on Natural Resources was first mentioned in the Committee's report on its first session, *Official Records of the Economic and Social Council, Fiftieth Session, Supplement No. 6* (E/4969-E/C.7/13), section 4 ("other natural resources"), para. 94 (d). The work of the Committee (later the Committee on Energy and Natural Resources for Development) was subsequently transferred to the Commission on Sustainable Development.

[5] "The natural resources of the earth including the air ... must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate" (adopted at Stockholm on 16 June 1972, see *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 (A/CONF.48/14/Rev.1 and Corr.1), part one, chap. I, principle 2).

[6] "[A]tmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity" (World Charter for Nature, General Assembly resolution 37/7 of 28 October 1982, annex, general principles, para. 4).

[7] The World Trade Organization (WTO) Panel and Appellate Body recognized in the *Gasoline* case of 1996 that clean air was an "exhaustible natural resource" that could be "depleted". Report of the Appellate Body, *United States-Standards for Reformulated and Conventional Gasoline* (1996), WT/DS2/AB/R.

[8] See the 2001 Stockholm Convention on Persistent Organic Pollutants, United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119 (noting in the preamble that "persistent organic pollutants, ... are transported, through air ... across international boundaries and deposited far from their place of release, where they accumulate in terrestrial and aquatic ecosystems"). The 2012 amendment to the Gothenburg Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg, 30 November 1999, United Nations, *Treaty Series*, vol. 2319, p. 81) indicates in the third preambular paragraph: "Concerned ...

identified as one of the areas most seriously affected by the worldwide spread of deleterious pollutants.[9]

(4) The third preambular paragraph acknowledges the "close interaction" that arises from, as a factual matter, the physical relationship between the atmosphere and the oceans. A significant proportion of the pollution of the marine environment from or through the atmosphere originates from land-based sources, including from anthropogenic activities on land.[10] Human activities are also responsible for global warming, which causes a rise in temperature of the oceans and in turn results in extreme atmospheric conditions of flood and drought.[11] In its resolution 71/257 of 23 December 2016, the General Assembly confirmed the effect of climate change on oceans and stressed the importance of increasing the scientific understanding of the oceans-atmosphere interface.[12]

(5) In 2015, the First Global Integrated Marine Assessment (first World Ocean Assessment) was completed as a comprehensive, in-depth study on the state of the marine environment including a chapter addressing in part the substances polluting the oceans from land-based sources through the atmosphere.[13] The summary of the report was approved by the General Assembly at its seventieth session.[14]

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that emitted [chemical substances] are transported in the atmosphere over long distance and may have adverse transboundary effects." The 2013 Minamata Convention on Mercury (Kumamoto (Japan), 10 October 2013, text available at https://treaties.un.org/doc/Treaties/2013/10/20131010%2011-16%20AM/CTC-XXVII-17.pdf) recognizes mercury as "a chemical of global concern owing to its long-range atmospheric transport" (first preambular para.); See, J.S. Fuglesvedt *et al.*, "Transport impacts on atmosphere and climate: metrics", *Atmospheric Environment*, vol. 44 (2010), pp. 4648–4677; D.J. Wuebbles, H. Lei and J.-T Lin, "Inter-continental transport of aerosols and photochemical oxidants from Asia and its consequences", *Environmental Pollution*, vol. 150 (2007), pp. 65–84; J.-T Lin, X.-Z Liang and D.J. Wuebbles, "Effects of inter-continental transport on surface ozone over the United States: Present and future assessment with a global model", *Geophysical Research Letters*, vol. 35 (2008).

[9] Several of these pollution threats to the Arctic environment have been identified, such as persistent organic pollutants and mercury, which originate mainly from sources outside the region. These pollutants end up in the Arctic from southern industrial regions of Europe and other continents *via* prevailing northerly winds and ocean circulation. See T. Koivurova, P. Kankaanpää and A. Stepien, "Innovative environmental protection: lessons from the Arctic," *Journal of Environmental Law*, vol. 27 (2015), pp. 285–311, at p. 297.

[10] R.A. Duce *et al.*, "The atmospheric input of trace species to the world ocean", *Global Biogeochemical Cycles*, vol. 5 (1991), pp. 193–259; T. Jickells and C.M. Moore, "The importance of atmospheric deposition for ocean productivity", *Annual Review of Ecology, Evolution, and Systematics*, vol. 46 (2015), pp. 481–501.

[11] According to the Intergovernmental Panel on Climate Change, "Climate change 2014 synthesis report: summary for policymakers", p. 4: "Ocean warming dominates the increase in energy stored in the climate system, accounting for more than 90% of the energy accumulated between 1971 and 2010 (*high confidence*), with only about 1% stored in the atmosphere. On a global scale, the ocean warming is largest near the surface, and the upper 75 m warmed by 0.11 [0.09 to 0.13] °C per decade over the period 1971 to 2010. It is *virtually certain* that the upper ocean (0–700 m) warmed from 1971 to 2010, and it *likely* warmed between the 1870s and 1971". Because of the rise in ocean temperatures, many scientific analyses suggest risk of severe and widespread drought in the twenty-first century over many land areas. See S.K. Min *et al.*, "Human contribution to more-intense precipitation extremes", *Nature*, vol. 470 (2011), pp. 378–381; A. Dai, "Increasing drought under global warming in observations and models", *Nature Climate Change*, vol. 3 (2013), pp. 52–58; and J. Sheffield, E.F. Wood, and M.L. Roderick, "Little change in global drought over the past 60 years", *Nature*, vol. 491 (2012), pp. 435–438. See also Ø. Hov, "Overview: oceans and the atmosphere" and T. Jickells, "Linkages between the oceans and the atmosphere", in "Summary of the informal meeting of the International Law Commission: dialogue with atmospheric scientists (third session), 4 May 2017", paras. 4–12 and 21–30, respectively. Available from http://legal.un.org/docs/?path=../ilc/sessions/69/pdfs/english/informal_dialogue_4may2017.pdf&lang=E.

[12] General Assembly resolution 71/257 of 23 December 2016 on oceans and the law of the sea, paras. 185–196 and 279.

[13] United Nations Division for Ocean Affairs and the Law of the Sea, "First Global Integrated Marine Assessment (first World Ocean Assessment)". Available from http://www.un.org/depts/los/global_

(6) Among the various human activities that have an impact on the oceans, greenhouse gas emissions from ships contribute to global warming and climate change. The 2009 study by the International Maritime Organization (IMO) on greenhouse gas emissions classified such emissions from ships into four categories, namely: emissions of exhaust gases, cargo emissions, emissions of refrigerants and other emissions.[15] Research indicates that excessive greenhouse gas emissions from ships change the composition of the atmosphere and climate, and cause a negative impact on the marine environment and human health.[16]

(7) The General Assembly has continued to emphasize the urgency of addressing the effects of atmospheric degradation, such as increases in global temperatures, sea-level rise, ocean acidification and the impact of other climate changes that are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States, and threatening the survival of many societies.[17]

(8) The third preambular paragraph is also linked to paragraph 1 of draft guideline 9 in the sense that the physical linkage that exists between the atmosphere and the oceans forms the physical basis of the interrelationship between the rules on the protection of the atmosphere and the rules of the law of the sea.[18]

(9) The fourth preambular paragraph pronounces, bearing in mind the importance of the problems relating to the atmosphere, as aforementioned, that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a "pressing concern of the international community as a whole". While a number of treaties and literature demonstrate some support for the concept of "common concern of humankind",[19] the

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reporting/WOA_RegProcess.htm (accessed 7 July 2017) (see, in particular, chap. 20 on "Coastal, riverine and atmospheric inputs from land").

[14] General Assembly resolution 70/235 of 23 December 2015.

[15] Ø. Buhaug and others, *Second IMO GHG Study 2009* (London, IMO, 2009), p. 23. See also T.W.P. Smith and others, *Third IMO GHG Study* (London, IMO, 2014), executive summary, table 1. M. Righi, J. Hendricks and R. Sausen, "The global impact of the transport sectors on atmospheric aerosol in 2030 — Part 1: land transport and shipping", *Atmospheric Chemistry and Physics*, vol. 15 (2015), pp. 633–651.

[16] Most of the greenhouse gas emissions from ships are emitted in or transported to the marine boundary layer where they affect atmospheric composition. See, e.g., V. Eyring and others, "Transport impacts on atmosphere and climate: shipping", *Atmospheric Environment*, vol. 44 (2010), pp. 4735, 4744–4745 and 4752–4753. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change asserted that greenhouse gas emissions have led to global ocean warming, the rise of ocean temperatures and ocean acidification (Intergovernmental Panel on Climate Change, "Climate change 2014 synthesis report", available from http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf (accessed 7 July 2017), p. 40; D.E.J. Currie and K. Wowk, "Climate change and CO_2 in the oceans and global oceans governance", *Carbon and Climate Law Review*, vol. 3 (2009), pp. 387 and 389; C. Schofield, "Shifting limits? Sea level rise and options to secure maritime jurisdictional claims" *Carbon and Climate Law Review*, vol. 3 (2009), p. 12; and S.R. Cooley and J.T. Mathis, "Addressing ocean acidification as part of sustainable ocean development", *Ocean Yearbook*, vol. 27 (2013), pp. 29–47.

[17] General Assembly resolution 70/1 of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development, para. 14 ("Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk."). See also "Oceans and the law of the sea: report of the Secretary-General" (A/71/74/Add.1), chap. VIII ("Oceans and climate change and ocean acidification"), paras. 115–122.

[18] See para. (6) of the commentary to draft guideline 9 below.

[19] Paragraph 1 of the preamble to the 1992 United Nations Framework Convention on Climate Change ((New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107) acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind". Likewise, the preamble to the 1992 Convention on Biological Diversity (United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79) shows parties to be "[c]onscious ... of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere," (para. 2) and affirms that "the conservation of biological diversity is a common concern of humankind"

Commission decided not to adopt this language for the characterization of the problem, as the legal consequences of the concept of common concern of humankind remain unclear at the present stage of development of international law relating to the atmosphere. It was considered appropriate to express the concern of the international community as a matter of a factual statement, and not as a normative statement, as such, of the gravity of the atmospheric problems. In this context, therefore, the expression "a pressing concern of the international community as a whole" has been employed. This is an expression that the Commission has frequently employed as one of the criteria for the selection of new topics for inclusion in its long-term programme of work.[20]

(10) The fifth preambular paragraph, having regard to considerations of equity, concerns the special situation and needs of developing countries. One of the first attempts to incorporate such a principle was the Washington Conference of the International Labour Organization in 1919, at which delegations from Asia and Africa succeeded in ensuring the adoption of differential labour standards.[21] Another example is the Generalized System of Preferences elaborated under the United Nations Conference on Trade and Development in the 1970s, as reflected in draft article 23 of the Commission's 1978 draft articles on most-favoured-nation clauses.[22]

(para. 3). The 1994 Convention to Combat Desertification in Those Countries Experiencing Drought and/or Desertification, Particularly in Africa (United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3) adopted phrases similar to common concern in its preamble, including "the centre of concerns", "the urgent concern of the international community" and "problems of global dimension" for combatting desertification and drought. Other instruments such as the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants and the Gothenburg Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution employ similar concepts to the common concern. See, A.E. Boyle, "International law and the protection of the global atmosphere: concepts, categories and principles", in *International Law and Global Climate Change*, (Leiden, Kluwer Academic, 1991), pp. 11–12; D. French, "Common concern, common heritage and other global(-ising) concepts: rhetorical devices, legal principles or a fundamental challenge?" in M. Bowman, P. Davies and E. Goodwin (eds.), *Research Handbook on Biodiversity and Law* (Cheltenham/Northampton, Edward Elgar, 2016), pp. 334–360, p. 347; A. Kiss, "The common concern of mankind", *Environmental Policy and Law*, vol. 27 (1997), p. 246; A.A. Cançado-Trindade and D.J. Attard, "The implication of the "common concern of mankind" concept on global environmental issues", in *Policies and Laws on Global Warming: International and Comparative Analysis*, T. Iwama (ed.) (Tokyo, Environmental Research Centre, 1991), pp. 7–13; J. Brunnée, "Common areas, common heritage, and common concern", in *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunnée and H. Hey (eds.) (Oxford, Oxford University Press, 2007), pp. 565–566. See also C. Kreuter-Kirchhoff, "Atmosphere, international protection", *Max Planck Encyclopedia of Public International Law*, vol. I, R. Wolfrum (ed.) (Oxford, Oxford University Press, 2012), pp. 737–744 (the atmosphere as a "common concern of mankind").

[20] *Yearbook ... 1997*, vol. II (Part Two), para. 238; *Yearbook ... 1998*, vol. II (Part Two), para. 553. See also *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 269. The Commission has agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

[21] On the basis of art. 405, para. 3, of the 1919 Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919), which became art. 19, para. 3, of the International Labour Organization Constitution (9 October 1946, United Nations, *Treaty Series*, vol. 15, No. 229, p. 35) (labour conventions "shall have due regard" to the special circumstances of countries where local industrial conditions are "substantially different"). The same principle also appeared in some of the conventions approved by the Organization in 1919 and in several conventions adopted afterwards. See I.F. Ayusawa, *International Labor Legislation* (New York, Columbia University, 1920), chap. VI, pp. 149 *et seq.*

[22] See art. 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences) and art. 30 (New rules of international law in favour of developing countries) of the draft articles on the most-favoured-nation clauses adopted by the Commission at its thirtieth session in 1978, *Yearbook ... 1978*, vol. II (Part Two), paras. 74, see also paras. 47–72. S. Murase, *Economic Basis of International Law* (Tokyo, Yuhikaku, 2001), pp. 109–179 (in Japanese). And see the earlier exceptions for developing countries specified in art. XVIII of the 1947 General Agreement on Tariffs and Trade, United Nations, *Treaty Series*, vol. 55, No. 814, p. 194.

(11) The need for special consideration for developing countries in the context of environmental protection has been endorsed by a number of international instruments, such as the 1972 Stockholm Declaration,[23] and the 1992 Rio Declaration on Environment and Development (hereinafter, "Rio Declaration").[24] Principle 12 of the Stockholm Declaration attaches importance to "taking into account the circumstances and particular requirements of developing countries". Principle 6 of the Rio Declaration highlights "the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable". The principle is similarly reflected in article 3 of the 1992 United Nations Framework Convention on Climate Change[25] and article 2 of the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change (hereinafter, "Paris Agreement").[26]

(12) The formulation of the fifth preambular paragraph is based on the seventh paragraph of the preamble of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.[27]

(13) The sixth preambular paragraph addresses one of the most profound impacts of atmospheric degradation, that is the sea-level rise caused by global warming. It draws particular attention to the special situation of low-lying coastal areas and small island developing States due to sea-level rise. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change estimates that the global mean sea-level rise is likely to be between 26 cm and 98 cm by the year 2100.[28] While exact figures and rates of change still remain uncertain, the report states that it is "virtually certain" that sea levels will continue to rise during the twenty-first century, and for centuries beyond — even if the concentrations of greenhouse gas emissions are stabilized. Moreover, sea-level rise is likely to exhibit "a strong regional pattern, with some places experiencing significant deviations of local and regional sea level change from the global mean change".[29] That degree of change in sea levels may pose a potentially serious, maybe even disastrous, threat to many coastal areas, especially those with large, heavily populated and low-lying coastal areas, as well as to small island developing States.[30]

(14) The sixth preambular paragraph is linked to the interrelationship between the rules of international law relating to the protection of the atmosphere and the rules of the law of the sea addressed in paragraph 1 of draft guideline 9.[31] This preambular paragraph is also linked to the special consideration to be given to persons and groups in vulnerable situations, which are referred to in paragraph 3 of draft guideline 9.[32] The words "in

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[23] See L.B. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal*, vol. 14 (1973), pp. 423–515, at pp. 485–493.

[24] Adopted at Rio de Janeiro on 14 June 1992, see *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (vol. I) and Corr.1), resolution I, p. 3.

[25] United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.

[26] Paris Agreement under the United Nations Framework Convention on Climate Change (Paris, 12 December 2015), https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf .

[27] Adopted by the General Assembly in resolution 51/229 (annex) on 21 May 1997. The Convention entered into force on 17 August 2014.

[28] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom, Cambridge University Press, 2013), p. 1180.

[29] *Ibid.*, p. 1140.

[30] See A.H.A. Soons, "The effects of a rising sea level on maritime limits and boundaries", *Netherlands International Law Review*, vol. 37 (1990), pp. 207–232; M. Hayashi, "Sea-level rise and the law of the sea: future options", in *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden, Brill/Martinus Nijhoff, 2011), pp. 187 *et seq*. See also, International Law Association, *Report of the Seventy-fifth Conference held in Sofia, August 2012* (London, 2012), pp. 385–428, and International Law Association, *Johannesburg Conference (2016): International Law and Sea Level Rise* (interim report), pp. 13–18.

[31] See para. (6) of the commentary to draft guideline 9 below.

[32] See para. (16) of the commentary to draft guideline 9 below.

particular" are intended to acknowledge specific areas without necessarily limiting the list of potentially affected areas.

(15) The seventh preambular paragraph emphasizes the interests of future generations, including with a view to human rights protection. The goal is to ensure that the planet remains habitable for future generations. In taking measures to protect the atmosphere today, it is important to take into account the long-term conservation of the quality of the atmosphere. The 2015 Paris Agreement, in its preamble, after acknowledging that climate change is a common concern of humankind, provides that parties should, when taking action to address climate change, respect, promote and consider, among other things, their respective obligations on human rights, as well as intergenerational equity. The importance of "intergenerational" considerations was already expressed in principle 1 of the 1972 Stockholm Declaration.[33] It also underpins the concept of sustainable development, as formulated in the 1987 Brundtland Report, *Our Common Future*,[34] and informs the 2030 Agenda for Sustainable Development.[35] It is also reflected in the preamble of the Convention on Biological Diversity of 1992,[36] and in other treaties.[37] Article 3, paragraph 1, of the United Nations Framework Convention on Climate Change of 1992 provides that: "Parties should protect the climate system for the benefit of present and future generations of humankind". The International Court of Justice has noted, in its 1996 advisory opinion in the *Nuclear Weapons* case with respect to such weapons, the imperative to take into account "in particular their … ability to cause damage to generations to come".[38]

(16) The Commission opted for the term "interests" rather than "benefit" under the seventh preambular paragraph. A similar formulation is used in draft guideline 6 which refers to the interests of future generations in the context of "equitable and reasonable utilization of the atmosphere".[39]

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[33] Principle 1 of the Declaration refers to the "solemn responsibility to protect and improve the environment for present and future generations".

[34] Report of the World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987). It emphasized the importance of "development that meets the needs of the present without compromising the ability of future generations" (p. 43).

[35] General Assembly resolution 70/1 of 25 September 2015, which emphasizes the need to protect the planet from degradation so that it can "support the needs of present and future generations".

[36] The Preamble of the Convention provides for the "benefit of present and future generations" in conservation and sustainable use of biological diversity.

[37] Art. 4 (vi) of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Vienna, 5 September 1997, United Nations, *Treaty Series*, vol. 2153, No. 37605, p. 303) provides that parties shall "strive to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation".

[38] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 244, para. 36.

[39] Though there are as yet no decisions by international tribunals concerning customary intergenerational rights, there have been many national court decisions, which may constitute practice for the purposes of customary international law, recognizing intergenerational equity, see C. Redgwell, "Intra- and inter-generational equity", in *The Oxford Handbook of International Climate Change Law*, C.P. Carlarne, K.R. Gray and R.G. Tarasofsky (eds.) (Oxford, Oxford University Press, 2016), pp. 185–201, at p. 198. See also Australia, *Gray v. Minister for Planning*, [2006] NSWLEC 720; India, *Vellore Citizens' Welfare Forum and State of Tamil Nadu (joining) v. Union of India and others*, original public interest writ petition, 1996 5 SCR 241, ILDC 443 (IN 1996); Kenya, *Waweru, Mwangi (joining) and others (joining) v. Kenya*, miscellaneous civil application, Case No. 118 of 2004, Application No. 118/04, ILDC 880 (KE 2006); South Africa, *Fuel Retailers Association of South Africa v. Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and others*, [2007] ZACC 13, 10 BCLR 1059; Pakistan, *Rabab Ali v. Federation of Pakistan*, petition filed 6 April 2016 (summary available at www.ourchildrenstrust.org/pakistan). For commentary, see E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo, United Nations University Press, 1989), p. 96; M. Bruce, "Institutional aspects of a charter of the rights of future generations", in *Our Responsibilities Towards Future Generations*, S. Busuttil *et al.* (eds.) (Valetta, UNESCO and Foundation for International Studies, University of Malta, 1990), pp. 127–131; T. Allen, "The Philippine children's case: recognizing legal standing for future generations",

(17) The eighth preambular paragraph reproduces the 2013 understanding of the Commission on the inclusion of the topic in its programme of work at its sixty-fifth session in 2013. It was agreed that the terminology and location of this paragraph would be revisited at a later stage in the Commission's work on this topic.[40]

Guideline 1
Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Commentary

(1) The Commission has considered it desirable, as a matter of practical necessity, to provide a draft guideline on the "Use of terms" in order to have a common understanding of what is covered by the present draft guidelines. The terms used are provided only "for the purposes of the present draft guidelines", and are not intended in any way to affect any existing or future definitions of any such terms in international law.

(2) No definition has been given to the term "atmosphere" in the relevant international instruments. The Commission, however, considered it necessary to provide a working definition for the present draft guidelines, and the definition given in paragraph (a) is inspired by the definition given by a working group of the Intergovernmental Panel on Climate Change.[41]

(3) The Commission considered it necessary that its legal definition be consistent with the approach of scientists. According to scientists, the atmosphere exists in what is called

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Georgetown International Environmental Law Review, vol. 6 (1994), pp. 713–741 (referring to the judgment of the Philippine Supreme Court in *Minors Oposa et al. v. Factoran* (30 July 1993), *International Legal Materials*, vol. 33 (1994), p. 168). Standing to sue in some proceedings was granted on the basis of the "public trust doctrine", which holds governments accountable as trustees for the management of common environmental resources. See M.C. Wood and C.W. Woodward IV, "Atmospheric trust litigation and the constitutional right to a healthy climate system: judicial recognition at last", *Washington Journal of Environmental Law and Policy*, vol. 6 (2016), pp. 634–684; C. Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester, Manchester University Press, 1999); K. Coghill, C. Sampford and T. Smith (eds.), *Fiduciary Duty and the Atmospheric Trust* (London, Routledge, 2012); M.C. Blumm and M.C. Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law*, 2nd ed. (Durham, North Carolina, Carolina Academic Press, 2015); and K. Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Cheltenham, Edward Elgar Publishing, 2015). In a judgment on 13 December 1996, the Indian Supreme Court declared the public trust doctrine "the law of the land"; *M.C. Mehta v. Kamal Nath and Others*, (1997) 1 Supreme Court Cases 388, reprinted in C.O. Okidi, ed., *Compendium of Judicial Decisions in Matters Related to the Environment: National Decisions*, vol. I (Nairobi, United Nations Environment Programme/United Nations Development Programme, 1998), p. 259. See J. Razzaque, "Application of public trust doctrine in Indian environmental cases", *Journal of Environmental Law*, vol. 13 (2001), pp. 221–234.

[40] See also *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 168.

[41] Fifth Assessment Report, Working Group III, annex I. Intergovernmental Panel on Climate Change, *Climate Change 2014: Mitigation of Climate Change*, O. Edenhofer et al. (eds.) (Cambridge University Press, 2014), p. 1252, available at www.ipcc.ch/report/ar5/wg3/.

the atmospheric shell.[42] Physically, it extends upwards from the Earth's surface, which is the bottom boundary of the dry atmosphere. The average composition of the atmosphere up to an altitude of 25 km is as follows: nitrogen (78.08%), oxygen (20.95%), together with trace gases, such as argon (0.93%), helium and radiatively active greenhouse gases, such as carbon dioxide (0.035%) and ozone, as well as greenhouse water vapour in highly variable amounts.[43] The atmosphere also contains clouds and aerosols.[44] The atmosphere is divided vertically into five spheres on the basis of temperature characteristics. From the lower to upper layers, these spheres are: troposphere, stratosphere, mesosphere, thermosphere, and the exosphere. Approximately 80 per cent of air mass exists in the troposphere and 20 per cent in the stratosphere. The thin, white, hazy belt (with a thickness of less than 1 per cent of the radius of the globe) that one sees when looking at the earth from a distance is the atmosphere. Scientifically these spheres are grouped together as the "*lower atmosphere*", which extends to an average altitude of 50 km, and can be distinguished from the "*upper atmosphere*".[45] The temperature of the atmosphere changes with altitude. In the troposphere (up to the tropopause, at a height of about 12 km), the temperature decreases as altitude increases because of the absorption and radiation of solar energy by the surface of the planet.[46] In contrast, in the stratosphere (up to the stratopause, at a height of nearly 50 km), temperature gradually increases with height[47] because of the absorption of ultraviolet radiation by ozone. In the mesosphere (up to the mesopause, at a height of above 80 km), temperatures again decrease with altitude. In the thermosphere, temperatures once more rise rapidly because of X-ray and ultraviolet radiation from the sun. The atmosphere "has no well-defined upper limit".[48]

(4) The definition, in paragraph (a), of the "atmosphere" as the envelope of gases surrounding the Earth represents a "physical" description of the atmosphere. There is also a "functional" aspect, which involves the large-scale movement of air. The atmospheric movement has a dynamic and fluctuating feature. The air moves and circulates around the Earth in a complicated formation called "atmospheric circulation". The Commission has decided, as noted earlier in the commentary to the preamble, to refer to this functional aspect of the atmosphere in the second paragraph of the preamble.[49]

(5) It is particularly important to recognize the function of the atmosphere as a medium within which there is constant movement as it is within that context that the "transport and dispersion" of polluting and degrading substances occurs. Indeed, the long-range transboundary movement of polluting substances is one of the major problems for the

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[42] The American Meteorology Society defines the "atmospheric shell" (also called atmospheric layer or atmospheric region) as "any one of a number of strata or 'layers' of the earth's atmosphere" (available at http://glossary.ametsoc.org/wiki/Atmospheric_shell).

[43] Physically, water vapour, which accounts for roughly 0.25 per cent of the mass of the atmosphere, is a highly variable constituent. In atmospheric science, "because of the large variability of water vapor concentrations in air, it is customary to list the percentages of the various constituents in relation to dry air". Ozone concentrations are also highly variable. Over 0.1 ppmv (parts per million by volume) of ozone concentration in the atmosphere is considered hazardous to human beings. See J.M. Wallace and P.V. Hobbs, *Atmospheric Science: An Introductory Survey*, 2nd ed. (Boston, Elsevier Academic Press, 2006), p. 8.

[44] *Ibid.*

[45] The American Meteorological Society defines the "lower atmosphere" as "generally and quite loosely, that part of the atmosphere in which most weather phenomena occur (i.e., the troposphere and lower stratosphere); hence used in contrast to the common meaning for the upper atmosphere" (available at http://glossary.ametsoc.org/wiki/Lower_atmosphere). The "upper atmosphere" is defined as residual, that is "the general term applied to the atmosphere above the troposphere" (available at http://glossary.ametsoc.org/wiki/Upper_atmosphere).

[46] The thickness of the troposphere is not the same everywhere; it depends on the latitude and the season. The top of the troposphere lies at an altitude of about 17 km at the equator, although it is lower at the poles. On average, the height of the outer boundary of the troposphere is about 12 km. See E.J. Tarbuck, F.K. Lutgens and D. Tasa, *Earth Science*, 13th ed. (New Jersey, Pearson, 2011), p. 466.

[47] Strictly, the temperature of the stratosphere remains constant to a height of about 20–35 km and then begins a gradual increase.

[48] See Tarbuck, Lutgens and Tasa, *Earth Science* (footnote 46 above), p. 467.

[49] See above para. (3) of the commentary to the preamble.

atmospheric environment. In addition to transboundary pollution, other concerns relate to the depletion of the ozone layer and to climate change.

(6) Paragraph (b) defines "atmospheric pollution" and addresses transboundary air pollution, whereas paragraph (c) defines "atmospheric degradation" and refers to global atmospheric problems. By stating "by humans", both paragraphs (b) and (c) make it clear that the draft guidelines concern "anthropogenic" atmospheric pollution and atmospheric degradation. The Commission is aware that the focus on human activity, whether direct or indirect, is a deliberate one, as the present guidelines seek to provide guidance to States and the international community.

(7) The term "atmospheric pollution" (or, air pollution) is sometimes used broadly to include global deterioration of atmospheric conditions such as ozone depletion and climate change,[50] but the term is used in the present draft guidelines in a narrow sense, in line with existing treaty practice. It thus excludes the global issues from the definition of atmospheric pollution.

(8) In defining "atmospheric pollution", paragraph (b) uses the language that is essentially based on article 1 (a) of the 1979 Convention on Long-Range Transboundary Air Pollution,[51] which provides that:

> "[a]ir pollution" means "the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and 'air pollutants' shall be construed accordingly."

It may also be noted that article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea[52] defines the term "pollution" for the purposes of the marine environment as meaning "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health".[53] The deleterious effects arising from an introduction or release have to be of such a nature as to endanger human life and health and the Earth's natural environment, including by contributing to endangering them.

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[50] For instance, art. 1, para. 1, of the Cairo resolution (1987) of the Institute of International Law (*Institut de droit international*) on "Transboundary Air Pollution" provides that: "[f]or the purpose of this Resolution, 'pollution' means any physical, chemical or biological *alteration in the composition* or quality of the atmosphere which results directly or indirectly from human action or omission and produces injurious or deleterious effects in the environment of other States or of areas beyond the limits of national jurisdiction." (emphasis added). Available from www.idi-iil.org, *Resolutions*.

[51] Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217. The formulation of art. 1 (a) of the Convention on Long-Range Transboundary Air Pollution goes back to the definition of pollution by the Council of the Organization for Economic Cooperation and Development (OECD) in its Recommendation C(74)224 on "Principles concerning Transfrontier Pollution", of 14 November 1974 (*International Legal Materials*, vol. 14 (1975), p. 243), which reads as follows: "For the purpose of these principles, pollution means the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment". See H. van Edig (ed.), *Legal Aspects of Transfrontier Pollution* (Paris, OECD, 1977), p. 13; see also P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (3rd ed.) (Oxford, Oxford University Press, 2009), pp. 188–189; A. Kiss and D. Shelton, *International Environmental Law* (London, Graham & Trotman, 1991), p. 117 (definition of pollution: "also forms of energy such as noise, vibrations, heat, radiation are included").

[52] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[53] Art. 212 of the United Nations Convention on the Law of the Sea provides for an obligation to prevent airborne pollution of the sea, and to that extent, the definition of "pollution" in this Convention is relevant to atmospheric pollution.

(9) While article 1 (a) of the Convention on Long-Range Transboundary Air Pollution and article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea provide for "introduction of energy" (as well as substances) as part of the "pollution", the Commission has decided not to make an explicit reference to the term "energy" in the text of paragraph (b) of the draft guideline. It is the understanding of the Commission that, for the purposes of the draft guidelines, the word "substances" includes "energy". "Energy" is understood to include heat, light, noise and radioactivity introduced and released into the atmosphere through human activities.[54]

(10) The expression "effects extending beyond the State of origin" in paragraph (b) clarifies that the draft guidelines address the transboundary effects in the sense provided in article 1 (b) of the 1979 Convention on Long-Range Transboundary Air Pollution that:

> "[l]ong-range transboundary air pollution" means air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.

(11) Since "atmospheric pollution" is defined narrowly in paragraph (b), it is necessary, for the purposes of the draft guidelines, to address issues other than atmospheric pollution by means of a different definition. For this purpose, paragraph (c) provides the definition of "atmospheric degradation". This definition is intended to include problems of ozone depletion and climate change. It covers the alteration of the global atmospheric conditions caused by humans, whether directly or indirectly. These may be changes to the physical environment or biota or alterations to the composition of the global atmosphere. The 1985 Vienna Convention for the Protection of the Ozone Layer[55] provides the definition of "adverse effects" in article 1, paragraph 2, as meaning "changes in the physical environment or biota, including changes in climate, which have significant deleterious

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[54] With regard to heat, see World Meteorological Organization/International Global Atmospheric Chemistry, Project Report, "Impacts of megacities on air pollution and climate", Global Atmosphere Watch Report No. 205 (Geneva, World Meteorological Organization, 2012); D. Simon and H. Leck, "Urban adaptation to climate/environmental change: governance, policy and planning", Special Issue, *Urban Climate*, vol. 7 (2014) pp. 1–134; J.A. Arnfield, "Two decades of urban climate research: a review of turbulence, exchanges of energy and water, and the urban heat island", *International Journal of Climatology*, vol. 23 (2003), pp. 1–26; L. Gartland, *Heat Islands: Understanding and Mitigating Heat in Urban Areas* (London, Earthscan, 2008); see, in general, B. Stone Jr., *The City and the Coming Climate: Climate Change in the Places We Live* (Cambridge, Massachusetts, Cambridge University Press, 2012). Regarding light pollution, see C. Rich and T. Longcore (eds.), *Ecological Consequences of Artificial Night Lighting*, (Washington, D.C., Island Press, 2006); P. Cinzano and F. Falchi, "The propagation of light pollution in the atmosphere", *Monthly Notices of the Royal Astronomic Society*, vol. 427 (2012), pp. 3337–3357; F. Bashiri and C. Rosmani Che Hassan, "Light pollution and its effects on the environment", *International Journal of Fundamental Physical Sciences*, vol. 4 (2014), pp. 8–12. Regarding acoustic/noise pollution, see e.g. annex 16 of the 1944 Convention on International Civil Aviation (Chicago, 7 December 1944, United Nations, *Treaty Series*, vol. 15, No. 295 p. 295), vol. I: *Aircraft Noise*, 5th ed. 2008; see P. Davies and J. Goh, "Air transport and the environment: regulating aircraft noise", *Air and Space Law*, vol. 18 (1993), pp. 123–135. Concerning radioactive emissions, see D. Rauschning, "Legal problems of continuous and instantaneous long-distance air pollution: interim report", *Report of the Sixty-Second Conference of the International Law Association* (Seoul, 1986), pp. 198–223, at p. 219; and International Atomic Energy Agency, *Environmental Consequences of the Chernobyl Accident and their Remediation: Twenty Years of Experience – Report of the Chernobyl Forum Expert Group 'Environment'*, Radiological Assessment Report Series (2006), STI/PUB/1239. See also United Nations Scientific Committee on the Effects of Atomic Radiation, 2013 Report to the General Assembly, *Scientific Annex A: Levels and effects of radiation exposure due to the nuclear accident after the 2011 great east-Japan earthquake and tsunami* (United Nations publication, Sales No. E.14.IX.1), available at www.unscear.org/docs/reports/2013/13-85418_Report_2013_Annex_A.pdf. This is without prejudice to the peaceful uses of nuclear energy in relation to climate change in particular (see International Atomic Energy Agency, *Climate Change and Nuclear Power 2014* (Vienna, 2014), p. 7).

[55] Vienna Convention for the Protection of Ozone Layer (Vienna, 22 March 1985), United Nations, *Treaty Series*, vol. 1513, No. 26164, p. 293.

effects on human health or on the composition, resilience and productivity of natural and managed ecosystems, or on materials useful to mankind." Article 1, paragraph 2, of the United Nations Framework Convention on Climate defines "climate change" as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".

(12) The term "significant deleterious effects" is intended to qualify the range of human activities to be covered by the draft guidelines. The Commission has frequently employed the term "significant" in its previous work.[56] The Commission has stated that "*significant is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'*. The harm must lead to real detrimental effects [and]... such detrimental effects must be able to be measured by factual and objective standards".[57] Moreover, the term "significant", while determined by factual and objective criteria, also involves a value determination that depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation at a particular time might not be considered "significant" because at that time scientific knowledge or human appreciation did not assign much value to the resource. The question of what constitutes "significant" is more of a factual assessment.[58]

(13) While with respect to "atmospheric pollution" the introduction or release of substances has to contribute only to "deleterious" effects, in the case of "atmospheric degradation" the alteration of atmospheric conditions must have "significant deleterious effects". As is evident from draft guideline 2, on the scope of the guidelines, the present guidelines are concerned with the protection of the atmosphere from both atmospheric pollution and atmospheric degradation. As noted in paragraph (11) above, "adverse effects" in the Vienna Convention for the Protection of Ozone Layer (art. 1, para. 2) refers to changes, which have significant deleterious effects. The word "deleterious" refers to something harmful, often in a subtle or unexpected way.

Guideline 2
Scope of the guidelines

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

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[56] See for example art. 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses (1997) (General Assembly resolution 51/229 of 21 May 1997, annex); art. 1 of the draft articles on prevention of transboundary harm from hazardous activities (2001) (General Assembly resolution 62/68, annex); principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006) (General Assembly resolution 61/36, annex); art. 6 of the articles on the law of transboundary aquifers (2008) (General Assembly resolution 63/124, annex).

[57] Para. (4) of the commentary to draft art. 2 of the draft articles on Prevention of transboundary harm from hazardous activities, 2001, *Yearbook ... 2001*, Vol. II (Part Two) and corrigendum, p. 152, at para. 98.

[58] See, for example, the commentary to the draft articles on prevention of transboundary harm from hazardous activities (paras. (4) and (7) of the commentary to draft art. 2), *ibid.* See also the commentary to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (paras. (1) to (3) of the commentary to draft principle 2), *Yearbook ... 2006*, vol. II (Part Two), para. 67.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

Commentary

(1) Draft guideline 2 sets out the scope of the draft guidelines in relation to the protection of the atmosphere. Paragraph 1 describes the scope in a positive manner, indicating what the guidelines are concerned with, namely the protection of the atmosphere from atmospheric pollution and atmospheric degradation, while paragraphs 2 and 3 are formulated in a negative way, specifying what is not covered by the present draft guidelines. Paragraph 4 contains a saving clause on airspace and outer space.

(2) Paragraph 1 defines the scope of the draft guidelines on the basis of the definitions contained in paragraphs (b) and (c) of draft guideline 1. It will be recalled that the paragraph had previously been adopted by the Commission with alternative formulations in brackets, namely, "[contain guiding principles relating to]" and "[deal with]", which were left subject to further consideration. Upon review of the entire set of draft guidelines, the words "address", "relate to" or "concern" were considered and it was concluded that "concern", which had been used in defining the scope of the topic "Identification of customary international law", was more appropriate than the other options. Thus, paragraph 1 was adopted using the term "concern", which was preferred over the phrases "contain guiding principles relating to" and "deal with".

(3) Paragraph 1 deals with questions of the protection of the atmosphere in two areas, atmospheric pollution and atmospheric degradation. The draft guidelines are concerned only with anthropogenic causes and not with those of natural origins such as volcanic eruptions and meteorite collisions. The focus on transboundary pollution and global atmospheric degradation caused by human activity reflects the current realities, which are supported by the science.[59] According to the Intergovernmental Panel on Climate Change, the science indicates with 95 per cent certainty that human activity is the dominant cause of observed warming since the mid-twentieth century. The Panel has noted that human influence on the climate system is clear. Such influence has been detected in warming of the atmosphere and the ocean, in changes in the global water cycle, in reductions in snow and ice, in global mean sea-level rise, and in changes in some climate extremes.[60] The Panel has further noted that it is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in greenhouse gas concentrations and other anthropogenic "forcings" together.[61]

(4) The guidelines will also not deal with domestic or local pollution. It may be noted however that whatever happens locally may sometimes have a bearing on the transboundary and global context in so far as the protection of the atmosphere is concerned. Ameliorative human action, taken individually or collectively, may need to take into account the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.

(5) Sulphur dioxide and nitrogen oxides are the main sources of transboundary atmospheric pollution,[62] while climate change and depletion of the ozone layer are the two principal concerns leading to atmospheric degradation. [63] Certain ozone depleting substances also contribute to global warming.[64]

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[59] See generally, Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis", Summary for Policy makers*, available at www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf.

[60] *Ibid.*

[61] *Ibid.*

[62] Birnie, Boyle, Redgwell, *International Law and the Environment* (see footnote 51 above), p. 342.

[63] *Ibid.*, p. 336. The linkages between climate change and ozone depletion are addressed in the preamble as well as in art. 4 of the United Nations Framework Convention on Climate Change. The linkage between transboundary atmospheric pollution and climate change is addressed in the preamble and art. 2, para. 1, of the 2012 amendment of the Gothenburg Protocol.

[64] *Ibid.*

(6) Paragraphs 2 and 3, as well as the fourth preambular paragraph, reflect the 2013 understanding of the Commission reached when the topic was included in the programme of work of the Commission at its sixty-fifth session in 2013.[65]

(7) Paragraph 4 is a saving clause that the draft guidelines do not affect the status of airspace under international law. The atmosphere and airspace are two entirely different concepts, which should be distinguished. Airspace is a static and spatial-based institution over which the State, within its territory, has "complete and exclusive sovereignty." For instance, article 1 of the Convention on International Civil Aviation, provides that "every State has complete and exclusive sovereignty over the 'airspace' above its territory".[66] In turn, article 2 of the same Convention deems the territory of a State to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. The airspace beyond the boundaries of territorial waters is regarded as being outside the sovereignty of any State and is open for use by all States, like the high seas. On the other hand, the atmosphere, as an envelope of gases surrounding the Earth, is dynamic and fluctuating, with gases that constantly move without regard to territorial boundaries.[67] The atmosphere is invisible, intangible and non-separable.

(8) Moreover, while the atmosphere is spatially divided into spheres on the basis of temperature characteristics, there is no sharp scientific boundary between the atmosphere and outer space. Beyond 100 km, traces of the atmosphere gradually merge with the emptiness of space.[68] The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, is silent on the definition of "outer space".[69] The matter has been under discussion within the context of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space since 1959, which has looked at both spatial and function approaches to the questions of delimitation.[70]

(9) Accordingly, the Commission elected, in paragraph 4, to indicate that the draft guidelines do not affect the legal status of airspace nor address questions related to outer space. Moreover, the reference to outer space reflects of the 2013 understanding of the Commission.

Guideline 3
Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

Commentary

(1) Draft guideline 3 is central to the present draft guidelines. In particular, draft guidelines 4, 5 and 6, below, flow from this guideline; these three draft guidelines seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere.

(2) The draft guideline refers to both the transboundary and global contexts. It will be recalled that draft guideline 1 contains a "transboundary" element in defining "atmospheric

[65] *Official Records of the General Assembly, Sixty-eighth Session, Supplement 10* (A/68/10), para. 168.

[66] See art. 2, para. 2, of the United Nations Convention on the Law of the Sea, which provides that "sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil".

[67] See generally Birnie, Boyle and Redgwell, *International Law and the Environment* (footnote 51 above), chap. 6.

[68] Tarbuck, Lutgens and Tasa, *Earth Science* (see footnote 46 above), pp. 465 and 466.

[69] Moscow, London and Washington, D.C., 27 January 1967, United Nations, *Treaty Series*, vol. 610, No. 8843, p. 205.

[70] See, generally, B. Jasani (ed.), *Peaceful and Non-Peaceful uses of Space: Problems of Definition for the Prevention of an Arms Race*, United Nations Institute for Disarmament Research (New York, Taylor and Francis, 1991), especially chaps. 2–3.

pollution" (as the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects "extending beyond the State of origin", of such a nature as to endanger human life and health and the Earth's natural environment), and a "global" dimension in defining "atmospheric degradation" (as the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment). Draft guideline 3 delimits the obligation to protect the atmosphere to preventing, reducing and controlling atmospheric pollution and atmospheric degradation, thus differentiating the kinds of obligations pertaining to each. The formulation of the present draft guideline finds its genesis in principle 21 of the Stockholm Declaration, which reflected the finding in the *Trail Smelter* arbitration.[71] This is further reflected in principle 2 of the 1992 Rio Declaration.

(3) The reference to "States" for the purposes of the draft guideline denotes both the possibility of States acting "individually" and "jointly", as appropriate.

(4) As presently formulated, the draft guideline is without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts,[72] a matter on which there are different views. While there is support for recognizing that the obligations pertaining to the protection of the atmosphere from transboundary atmospheric pollution of global significance and global atmospheric degradation are obligations *erga omnes*, there is also support for the view that the legal consequences of such a recognition are not yet fully clear in the context of the present topic.

(5) Significant adverse effects on the atmosphere are caused, in large part, by the activities of individuals and private industries, which are not normally attributable to a State. In this respect, due diligence requires States to "ensure" that such activities within their jurisdiction or control do not cause significant adverse effects. This does not mean, however, that due diligence applies solely to private activities since a State's own activities are also subject to the due diligence rule.[73] Due diligence is an obligation to make best possible efforts in accordance with the capabilities of the State controlling the activities. Therefore, even where significant adverse effects materialize, that does not automatically constitute a failure of due diligence. Such failure is limited to the State's negligence to meet its obligation to take all appropriate measures to prevent, reduce or control human activities where these activities have or are likely to have significant adverse effects. The States' obligation "to ensure" does not require the achievement of a certain result (obligation of result) but only requires the best available efforts so as not to cause significant adverse effects (obligation of conduct). It requires States to take appropriate measures to control public and private conduct. Due diligence implies a duty of vigilance and prevention. It also requires taking into account the context and evolving standards, of both regulation and technology.

(6) The reference to "prevent, reduce or control" denotes a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules as may

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[71] See United Nations, *Reports of International Arbitral Awards* (UNRIAA), vol. III (Sales No. 1949.V.2), pp. 1905–1982 (Award of 11 March 1941), at p. 1965 *et seq.*; and the first report of the Special Rapporteur (A/CN.4/667), para. 43. See also A.K. Kuhn, "The Trail Smelter Arbitration, United States and Canada", *American Journal of International Law*, vol. 32 (1938), pp. 785–788 and *ibid.*, vol. 35 (1941), pp. 665–666; and J.E. Read, "The Trail Smelter Dispute", *Canadian Yearbook of International Law*, vol. 1 (1963), pp. 213–229.

[72] Art. 48 (Invocation of responsibility by a State other than an injured State) provides that: "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if ... (*b*) the obligation breached is owed to the international community as a whole" (General Assembly resolution 56/83 of 12 December 2001. For the articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. IV, sect. E).

[73] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 55, para. 101 ("the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory").

be relevant to atmospheric pollution on the one hand and atmospheric degradation on the other. The phrase "prevent, reduce or control" draws upon formulations contained in the United Nations Convention on the Law of the Sea[74] and the United Nations Framework Convention on Climate Change.

(7) Even though the appropriate measures to "prevent, reduce or control" apply to both atmospheric pollution and atmospheric degradation, the reference to "applicable rules of international law" signals a distinction between measures taken, bearing in mind the transboundary nature of atmospheric pollution and global nature of atmospheric degradation and the different rules that are applicable in relation thereto. In the context of transboundary atmospheric pollution, the obligation of States to prevent significant adverse effect is firmly established as customary international law, as confirmed, for example, by the Commission's articles on prevention of transboundary harm from hazardous activities[75] and by the jurisprudence of international courts and tribunals.[76] However, the existence of this obligation is still somewhat unsettled for global atmospheric degradation. The International Court of Justice has stated that "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment … of areas beyond national control is now part of the corpus of international law",[77] and has attached great significance to respect for the environment "not only for States but also for the whole of mankind".[78] The Tribunal in the *Iron Rhine Railway* case stated that the "duty to prevent, or at least mitigate [significant harm to the environment] … has now become a principle of general international law".[79] At the same time, the views of members diverged as to whether these pronouncements may be deemed as fully supporting the recognition that the obligation to prevent, reduce, or control global atmospheric degradation exists under customary international law. Nonetheless, such an obligation is found in relevant conventions.[80] In this context, it should be noted that the Paris Agreement,

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[74] Art. 194.

[75] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, chap. V, sect. E, art. 3 (Prevention): "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." The Commission has also dealt with the obligation of prevention in its articles on responsibility of States for internationally wrongful acts. Art. 14, para. 3, provides that "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues" (*ibid.*, chap. IV, sect. E). According to the commentary: "Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur" (*ibid.*, para. (14) of the commentary to art. 14, para. 3) The commentary illustrated "the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration" as one of the examples of the obligation of prevention (*ibid.*).

[76] The International Court of Justice has emphasized prevention as well. In the *Gabčíkovo-Nagymaros Project* case, the Court stated that it "is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 78, para. 140). In the *Iron Rhine Railway* case, the Arbitral Tribunal also stated that "[t]oday, in international environmental law, a growing emphasis is being put on the duty of prevention" (*Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, UNRIAA, vol. XXVII, pp. 35–125, at p. 116, para. 222).

[77] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 241–242, para. 29.

[78] *Gabčíkovo-Nagymaros Project* (see footnote 76 above), p. 41, para. 53; the Court cited the same paragraph in *Pulp Mills on the River Uruguay* (see footnote 73 above), p. 78, para. 193.

[79] *Iron Rhine Railway* (see footnote 76 above), pp. 66–67, para. 59.

[80] See, for example, United Nations Convention on the Law of the Sea, Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), *ibid.*, vol. 1513, No. 26164, p. 293, United Nations Framework Convention on Climate Change, Convention on Biological Diversity, United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 14 October 1994), *ibid.*, vol. 1954, No. 33480, p. 3, Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), *ibid.*, vol.

"acknowledging" in the preamble that "climate change is a common concern of humankind", states "the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity".[81]

Guideline 4
Environmental impact assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Commentary

(1) Draft guideline 4 deals with environmental impact assessment. This is the first of three draft guidelines that flow from the overarching draft guideline 3. In the *Construction of a Road in Costa Rica along the San Juan River* case, the International Court of Justice affirmed that "a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment".[82] In the above-mentioned case, the Court concluded that the State in question "ha[d] not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road".[83] In a separate opinion, Judge Owada noted that "an environmental impact assessment plays an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law".[84] Two other judgments, in the cases regarding the *Gabčíkovo-Nagymaros Project*[85] and the *Pulp Mills on the River Uruguay*,[86] alluded to the importance of an environmental impact assessment. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea rendered its Advisory Opinion on the *Responsibilities and obligations of States regarding activities in the Area* in 2011, in which the Chamber listed the obligation to conduct an environmental impact assessment as one of the direct obligations incumbent on sponsoring States.[87]

(2) The draft guideline is formulated in the passive tense — "States have the obligation to ensure that an environmental impact assessment is undertaken" as opposed to "States have an obligation to undertake an appropriate environmental impact assessment" — in order to signal that this is an obligation of conduct and given the broad nature of economic actors the obligation does not necessarily attach to the State itself to perform the assessment. What is required is that the State put in place the necessary legislative, regulatory and other measures for an environmental impact assessment to be conducted with respect to proposed activities. Notification and consultations are key to such an assessment.

(3) The phrase "of proposed activities under their jurisdiction or control" is intended to indicate that the obligation of States to ensure that an environment impact assessment is undertaken is in respect of activities under their jurisdiction or control. Since environmental threats have no respect for borders, it is not precluded that States, as part of their global

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2256, No. 40214, p. 119, and Minamata Convention on Mercury (Kumamoto, 10 October 2013). Available from https://treaties.un.org (Status of Multilateral Treaties Deposited with the Secretary general, chap. XVII.17).

[81] Art. 2, para. 1.

[82] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665, para. 153.

[83] *Ibid.*, para. 168.

[84] *Ibid.*, Separate Opinion of Judge Owada, para. 18.

[85] *Gabčíkovo-Nagymaros Project* (see footnote 76 above).

[86] *Pulp Mills on the River Uruguay* (see footnote 73 above).

[87] International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Dispute Chamber)*, advisory opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at paras. 122 and 141–150.

environmental responsibility, take decisions jointly regarding environmental impact assessments.

(4) A threshold was considered necessary for triggering the environmental impact assessment. The phrase "which are likely to cause significant adverse impact" has accordingly been inserted. It is drawn from the language of principle 17 of the Rio Declaration. Moreover, there are other instruments, such as the Espoo Convention on Environmental Impact Assessment in a Transboundary Context,[88] that use a similar threshold. In the *Pulp Mills* case, the Court indicated that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[89]

(5) By having a threshold of "likely to cause significant adverse impact", the draft guideline excludes an environmental impact assessment for an activity whose impact is likely to be minor. The impact of the potential harm must be "significant" for both "atmospheric pollution" and "atmospheric degradation". What constitutes "significant" requires a factual not a legal determination.[90]

(6) The phrase "in terms of atmospheric pollution or atmospheric degradation" was considered important as it relates the draft guideline to the two main issues of concern to the present draft guidelines as regards protection of the atmosphere, namely transboundary atmospheric pollution and atmospheric degradation. While the relevant precedents for the requirement of an environmental impact assessment primarily address transboundary contexts, it is considered that there is a similar requirement for projects that are likely to have significant adverse effects on the global atmosphere, such as those activities involving intentional large-scale modification of the atmosphere.[91] As regards the protection of the atmosphere, such activities may carry a more extensive risk of severe damage than even those causing transboundary harm, and therefore the same considerations should be applied *a fortiori* to those activities potentially causing global atmospheric degradation. Thus, the Kiev Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context encourages "strategic environmental assessment" of the likely environmental, including health, effects, which means any effect on the environment, including human health, flora, fauna, biodiversity, soil, climate, air, water, landscape, natural sites, material assets, cultural heritage and the interaction among these factors.[92]

(7) While it is acknowledged that transparency and public participation are important components in ensuring access to information and representation, it was considered that the parts dealing with procedural aspects of an environmental impact assessment should not be dealt with in the draft guideline itself. Principle 10 of the 1992 Rio Declaration provides that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. This includes access to information, the opportunity to participate in decision-making processes, and effective access to judicial and administrative proceedings.

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[88] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

[89] *Pulp Mills on the River Uruguay* (see footnote 73 above), p. 83, para. 204.

[90] The Commission has frequently employed the term "significant" in its work, including in the articles on the prevention of transboundary harm from hazardous activities (2001). In that case, the Commission chose not to define the term, recognizing that the question of "significance" requires a factual determination rather than a legal one (see the general commentary, para. (4), *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. V, sect. E). See, for example, paras. (4) and (7) of the commentary to art. 2 of the articles on the prevention of transboundary harm from hazardous activities (*ibid.*). See also the commentary to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (commentary to draft principle 2, paras. (1)–(3), *Yearbook ... 2006*, vol. II (Part Two), chap. V, sect. E).

[91] See draft guideline 7.

[92] Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context (Kiev, 21 May 2003), ECE/MP.EIA/2003/2 (available from: www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish), art. 2, paras. 6–7.

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[93] also addresses these issues. The Kiev Protocol on Strategic Environmental Assessment encourages the carrying out of public participation and consultations, and the taking into account of the results of the public participation and consultations in a plan or programme.[94]

Guideline 5
Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Commentary

(1) The atmosphere is a natural resource with limited assimilation capacity.[95] It is often not conceived of as exploitable in the same sense as, for example, mineral or oil and gas resources are explored and exploited. In truth, however, the atmosphere, in its physical and functional components, is exploitable and exploited. The polluter exploits the atmosphere by reducing its quality and its capacity to assimilate pollutants. The draft guideline draws analogies from the concept of "shared resource", while also recognizing that the unity of the global atmosphere requires recognition of the commonality of interests. Accordingly, this draft guideline proceeds on the premise that the atmosphere is a resource with limited assimilation capacity, the ability of which to sustain life on Earth is impacted by anthropogenic activities. In order to secure its protection, it is important to see it as a resource that is subject to exploitation, thereby subjecting the atmosphere to the principles of conservation and sustainable use. Some members expressed doubts whether the atmosphere could be treated analogously as transboundary watercourses or aquifers.

(2) It is acknowledged in paragraph 1 that the atmosphere is a "natural resource with a limited assimilation capacity". The second part of paragraph 1 seeks to integrate conservation and development so as to ensure that modifications to the planet continue to enable the survival and wellbeing of organisms on Earth. It does so by reference to the proposition that the utilization of the atmosphere should be undertaken in a sustainable manner. This is inspired by the Commission's formulations as reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses,[96] and the articles on the law of transboundary aquifers.[97]

(3) The term "utilization" is used broadly and in general terms evoking notions beyond actual exploitation. The atmosphere has been utilized in several ways. Likely, most of these activities that have been carried out so far are those conducted without a clear or concrete intention to affect atmospheric conditions. However, there have been certain activities the very purpose of which is to alter atmospheric conditions, such as weather modification. Some of the proposed technologies for intentional, large-scale modification of the atmosphere[98] are examples of the utilization of the atmosphere.

(4) The formulation "its utilization should be undertaken in a sustainable manner" in the present draft guideline is simple and not overly legalistic, which well reflects a

[93] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 28 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447.

[94] Art. 2, paras. 6–7.

[95] See para. (2) of the commentary to the preamble, above.

[96] Arts. 5 and 6. For the draft articles and commentaries thereto adopted by the Commission, see *Yearbook ... 1994*, vol. II (Part Two), chap. III, sect. E.

[97] General Assembly resolution 63/124 of 11 December 2008, annex, arts. 4–5. For the draft articles and commentaries thereto adopted by the Commission, see *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

[98] See draft guideline 7 below.

paradigmatic shift towards viewing the atmosphere as a natural resource that ought to be utilized in a sustainable manner. It is presented more as a statement of international policy and regulation than an operational code to determine rights and obligations among States.

(5) Paragraph 2 builds upon the language of the International Court of Justice in its judgment in the *Gabčíkovo-Nagymaros Project* case, in which it referred to the "need to reconcile environmental protection and economic development".[99] There are other relevant precedents. [100] The reference to "protection of the atmosphere" as opposed to "environmental protection" seeks to focus the paragraph on the subject matter of the present topic, which is the protection of the atmosphere.

Guideline 6
Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

Commentary

(1) Although equitable and reasonable utilization of the atmosphere is an important element of sustainability, as reflected in draft guideline 5, it is considered important to state it as an autonomous principle. Like draft guideline 5, the present guideline is formulated at a broad level of abstraction and generality.

(2) The draft guideline is formulated in general terms so as to apply the principle of equity[101] to the protection of the atmosphere as a natural resource that is to be shared by all.

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[99] *Gabčíkovo-Nagymaros Project* (see footnote 76 above), p. 78, para. 140.

[100] In the 2006 order of the *Pulp Mills* case, the International Court of Justice highlighted "the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development" (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, *I.C.J. Reports 2006*, p. 113, at p. 133, para. 80); the 1998 WTO Appellate Body decision on *United States – Import Prohibition of Certain Shrimp and Shrimp Products* stated that, "recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that article XX(g) of the [General Agreement on Tariffs and Trade] may be read as referring only to the conservation of exhaustible mineral or other non-living resources" (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 131, see also paras. 129 and 153); in the 2005 arbitral case of the *Iron Rhine Railway*, the Tribunal held as follows: "[t]here is considerable debate as to what, within the field of environmental law, constitutes 'rules' or 'principles': what is 'soft' law; and which environmental treaty law or principles have contributed to the development of customary international law. … The emerging principles, whatever their current status, make reference to … sustainable development. … Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause signify harm to the environment there is a duty to prevent, or at least mitigate such harm. … This duty, in the opinion of the Tribunal, has now become a principle of general international law", *Iron Rhine Railway* (see footnote 76 above), paras. 58–59; the 2013 Partial Award of the *Indus Waters Kishenganga Arbitration (Pakistan v. India)* states: "[t]here is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State. Since the time of *Trail Smelter*, a series of international … arbitral decisions have addressed the need to manage natural resources in a sustainable manner. In particular, the International Court of Justice expounded upon the principle of 'sustainable development' in *Gabčíkovo-Nagymaros* (see footnote 76 above), referring to the 'need to reconcile economic development with protection of the environment" (Permanent Court of Arbitration Award Series, *Indus Waters Kishenganga Arbitration (Pakistan v. India): Record of Proceedings 2010-2013*, Partial Award of 18 February 2013, para. 449. This was confirmed by the Final Award of 20 December 2013, para. 111.

[101] See, for example, J. Kokott, "Equity in international law", in *Fair Weather? Equity Concerns in Climate Change*, F.L. Toth (ed.) (Abingdon and New York, Routledge, 2014), pp. 173-192; *Frontier Dispute (Burkina Faso v. Mali), Judgment, I.C.J Reports 1986*, p. 554; See, in general, P. Weil, "L'équité dans la jurisprudence de la Cour internationale de Justice: Un mystère en voie de dissipation?", in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert*

The first part of the sentence deals with "equitable and reasonable" utilization. The formulation that the "atmosphere should be utilized in an equitable and reasonable manner" draws, in part, upon article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses, and article 4 of articles on the law of transboundary aquifers. It requires a balancing of interests and consideration of all relevant factors that may be unique to either atmospheric pollution or atmospheric degradation.

(3) The second part of the formulation addresses questions of intra- and intergenerational equity.[162] In order to draw out the link between the two aspects of equity, the Commission elected to use the phrase "taking into account the interests of future" instead of "and for the benefit of present and future generations of humankind". The words "the interests of", and not "the benefit of", have been used to signal the integrated nature of the atmosphere, the "exploitation" of which needs to take into account a balancing of interests to ensure sustenance for the Earth's living organisms.

Guideline 7
Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Commentary

(1) Draft guideline 7 deals with activities the very purpose of which is to alter atmospheric conditions. As the title of the draft guideline signals, it addresses only intentional modification on a large scale.

(2) The term "activities aimed at intentional large-scale modification of the atmosphere" is taken in part from the definition of "environmental modification techniques" that appears in the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques,[163] which refers to techniques for changing — through the deliberate manipulation of natural processes — the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

(3) These activities include what is commonly understood as "geo-engineering", the methods and technologies of which encompass carbon dioxide removal and solar radiation management. Activities related to the former involve the ocean, land and technical systems and seek to remove carbon dioxide from the atmosphere through natural sinks or through chemical engineering. Proposed techniques for carbon dioxide removal include: soil carbon sequestration; carbon capture and sequestration; ambient air capture; ocean fertilization; ocean alkalinity enhancement; and enhanced weathering. Indeed, afforestation has traditionally been employed to reduce carbon dioxide.

(4) According to scientific experts, solar radiation management is designed to mitigate the negative impacts of climate change by intentionally lowering the surface temperatures of the Earth. Proposed activities here include: "albedo enhancement", a method that involves increasing the reflectiveness of clouds or the surface of the Earth, so that more of the heat of the sun is reflected back into space; stratospheric aerosols, a technique that

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Jennings, V. Lowe and M. Fitzmaurice (eds.) (Cambridge, United Kingdom, Cambridge University Press, 1996), pp. 121–144; F. Francioni, "Equity in international law," in *Max Plank Encyclopedia of Public International Law*, vol. III, R. Wolfrum (ed.) (Oxford, Oxford University Press, 2013), pp. 632–642.

[162] C. Redgwell, "Principles and emerging norms in international law: intra- and inter-generational equity," *in* Cinnamon P. Carlarne, *et al.*, eds., *The Oxford Handbook on International Climate Change Law* (Oxford: Oxford University Press, 2016), pp. 185–201.; D. Shelton, "Equity" in *Oxford Handbook of International Environmental Law*, Bodansky *et al.* (eds.) (footnote 19 above), pp. 639–662.

[163] Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

involves the introduction of small, reflective particles into the upper atmosphere to reflect sunlight before it reaches the surface of the Earth; and space reflectors, which entail blocking a small proportion of sunlight before it reaches the Earth.

(5) As noted above, the term "activities" is broadly understood. However, there are certain other activities that are prohibited by international law, which are not covered by the present draft guideline, such as by the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques[104] and Protocol I to the Geneva Conventions of 1949.[105] Accordingly, the present draft guideline applies only to "non-military" activities. Military activities involving deliberate modifications of the atmosphere are outside the scope of the present guideline.

(6) Likewise, other activities will continue to be governed by various regimes. For example, afforestation has been incorporated in the Kyoto Protocol to the United Nations Framework Convention on Climate Change[106] regime and in the Paris Agreement (art. 5, para. 2). Under some international legal instruments, measures have been adopted for regulating carbon capture and storage. The 1996 Protocol (London Protocol)[107] to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[108] now includes an amended provision and annex, as well as new guidelines for controlling the dumping of wastes and other matter. To the extent that "ocean iron fertilization" and "ocean alkalinity enhancement" relate to questions of ocean dumping, the 1972 Convention and the London Protocol thereto are relevant.

(7) Activities aimed at intentional large-scale modification of the atmosphere have a significant potential for preventing, diverting, moderating or ameliorating the adverse effects of disasters and hazards, including drought, hurricanes, tornadoes, and enhancing crop production and the availability of water. At the same time, it is also recognized that they may have long-range and unexpected effects on existing climatic patterns that are not confined by national boundaries. As noted by the World Meteorological Organization with respect to weather modification: "The complexity of the atmospheric processes is such that a change in the weather induced artificially in one part of the world will necessarily have repercussions elsewhere … . Before undertaking an experiment on large-scale weather modification, the possible and desirable consequences must be carefully evaluated, and satisfactory international arrangements must be reached."[109]

(8) It is also not the intention of the present draft guideline to stifle innovation and scientific advancement. Principles 7 and 9 of the Rio Declaration acknowledge the importance of new and innovative technologies and cooperation in these areas. At the same time, this does not mean that those activities always have positive effects.

(9) Accordingly, the draft guideline does not seek either to authorize or to prohibit such activities unless there is agreement among States to take such a course of action. It simply

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[104] See art. 1.

[105] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3, arts. 35, para. 3 and 55; see also Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8, para. 2 (b) (iv).

[106] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162.

[107] 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 7 November 1996), *International Legal Materials*, vol. 36 (1997), p. 7.

[108] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, D.C., 29 December 1972), United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 138.

[109] See *Second Report on the Advancement of Atmospheric Science and Their Application in the Light of the Developments in Outer Space* (Geneva, World Meteorological Organization, 1963); see also Decision 8/7 (Earthwatch: assessment of outer limits) of the Governing Council of the United Nations Environment Programme, Part A (Provisions for co-operation between States in weather modification) of 29 April 1980.

sets out the principle that such activities, if undertaken, should be conducted with prudence and caution. The reference to "prudence and caution" is inspired by the language of the International Tribunal for the Law of the Sea in the cases of *Southern Blue Fin Tuna*,[110] the *Case of Mox Plant*;[111] and the *Case concerning Land Reclamation*.[112] The Tribunal stated in the last case: "*Considering* that, given the possible implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned." The draft guideline is cast in hortatory language, aimed at encouraging the development of rules to govern such activities, within the regimes competent in the various fields relevant to atmospheric pollution and atmospheric degradation.

(10) The last part of the guideline refers to "subject to any applicable rules of international law". It is understood that international law would continue to operate in the field of application of the draft guideline.

(11) It is widely acknowledged that such an activity should be conducted in a fully disclosed and transparent manner, and that an environmental impact assessment provided for in draft guideline 4 may be required for such an activity. It is considered that a project involving intentional large-scale modification of the atmosphere may well carry an extensive risk of severe damage, and therefore that *a fortiori* an assessment is necessary for such an activity.

(12) A number of members remained unpersuaded that there was a need for a draft guideline on this matter, which essentially remains controversial, and the discussion on it was evolving, and is based on scant practice. Other members were of the view that the draft guideline could be enhanced during second reading.

Guideline 8 [5][113]
International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Commentary

(1) International cooperation is at the core of the whole set of the present draft guidelines. The concept of international cooperation has undergone a significant change in international law,[114] and today is to a large extent built on the notion of common interests of

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[110] *Southern Blue Fin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at para. 77. The Tribunal stated that "*[c]onsidering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna".

[111] *Mox Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at para. 84 ("*[c]onsidering* that, in the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the Mox plant and in devising ways to deal with them, as appropriate").

[112] *Case concerning Land Reclamation by Singapore in and around the Strait of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, *ITLOS Reports 2003*, p. 10, at para. 99.

[113] The draft guideline was renumbered during the sixty-eighth session of the Commission. The original number appears in square brackets.

[114] W. Friedmann, *The Changing Structure of International Law* (London, Stevens & Sons, 1964), pp. 60–71; C. Leben, "The changing structure of international law revisited by way of introduction", *European Journal of International Law*, vol. 3 (1997), pp. 399–408. See also, J. Delbrück, "The international obligation to cooperate — an empty shell or a hard law principle of international law? —

the international community as a whole.[115] The fourth paragraph of the preamble to the present draft guidelines recognizes this in stating that the protection of the atmosphere from atmospheric pollution and degradation is "a pressing concern of the international community as a whole".

(2) In this context, paragraph 1 of the present draft guideline, provides the obligation of States to cooperate, as appropriate. In concrete terms, such cooperation is with other States and with relevant international organizations. The phrase "as appropriate" denotes certain flexibility and latitude for States in carrying out the obligation to cooperate depending on the nature and subject matter required for cooperation. The forms in which such cooperation may occur may also vary depending on the situation and allows for the exercise of a certain margin of appreciation of States. It may be at the bilateral, regional or multilateral levels. States may also individually take appropriate action.

(3) In the *Pulp Mills* case, the International Court of Justice emphasized linkages attendant to the obligation to inform cooperation between the parties and the obligation of prevention. The Court noted that, "it is by cooperating that the States concerned can jointly manage the risks of damage to the environment ... so as to prevent the damage in question".[116]

(4) International cooperation is found in several multilateral instruments relevant to the protection of the environment. Both the Stockholm Declaration and the Rio Declaration, in principle 24 and principle 27, respectively, stress the importance of cooperation, entailing good faith and a spirit of partnership.[117] In addition, among some of the existing treaties, the Vienna Convention for the Protection of the Ozone Layer (1985) provides, in its preamble, that the Parties to this Convention are "*[a]ware* that measures to protect the ozone layer from modifications due to human activities require international co-operation and action". Furthermore, the preamble of the United Nations Framework Convention on Climate Change (1992) acknowledges that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response ...", while reaffirming "the principle of sovereignty of States in international cooperation to address climate change".[118]

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a critical look at a much debated paradigm of modern international law", H.P. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity* (Liber Amicorum Rüdiger Wolfrum), vol. 1 (Leiden, Martinus Njihoff, 2012), pp. 3–16.

[115] B. Simma, "From bilateralism to community interests in international law", *Collected Courses of The Hague Academy of International Law, 1994-VI*, vol. 250, pp. 217–384; N. Okuwaki, "On compliance with the obligation to cooperate: new developments of 'international law for cooperation'", in *Aspects of International Law Studies* (Festschrift for Shinya Murase), J. Eto (ed.) (Tokyo, Shinzansha, 2015), pp. 5–46, at pp. 16–17 (in Japanese).

[116] *Pulp Mills on the River Uruguay* (footnote 73 above), p. 49, para. 77.

[117] Principle 24 of the Stockholm Declaration states:

"International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."
Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (see footnote 5 above).

Principle 274 of the Rio Declaration states:

"States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development."
Report of the United Nations Conference on the Human Environment, Rio de Janeiro, 3–14 June 1992, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigenda), resolution 1, annex I, chap. I.

[118] See also section 2 of Part XII of the United Nations Convention on the Law of the Sea, which provides for "Global and Regional Cooperation", setting out "Cooperation on global or regional basis" (art. 197), "Notification of imminent or actual damage" (art. 198), "Contingency plans against pollution" (art. 199), "Studies, research programmes and exchange of information and data" (art. 200)

(5) Paragraph 1 of article 8 of the Convention on the Law of the Non-navigational Uses of International Watercourses, on the general obligation to cooperate, provides that:

> "[W]atercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse."

(6) In its work, the Commission has also recognized the importance of the obligation to cooperate. The articles on prevention of transboundary harm from hazardous activities (2001) provide in draft article 4, on cooperation, that:

> "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof."

Further, the articles on the law of transboundary aquifers provide in draft article 7, General obligation to cooperate, that:

> "1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.
>
> 2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation."

(7) Finally, the articles on the protection of persons in the event of disasters (2016) provide, in draft article 7, a duty to cooperate.[119]

(8) Cooperation could take a variety of forms. Paragraph (b) of the draft guidelines stresses, in particular, the importance of cooperation in enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Paragraph (b) also highlights the exchange of information and joint monitoring.

(9) The Vienna Convention for the Protection of the Ozone Layer provides, in its preamble, that international cooperation and action should be "based on relevant scientific and technical considerations", and in article 4, paragraph (1), on cooperation in the legal, scientific and technical fields, there is provision that:

> "The Parties shall facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information relevant to this Convention as further elaborated in annex II. Such information shall be supplied to bodies agreed upon by the Parties."

Annex II to the Convention gives a detailed set of items for information exchange. Article 4, paragraph 2, provides for cooperation in the technical fields, taking into account the needs of developing countries.

(10) Article 4, paragraph 1, of the United Nations Framework Convention on Climate Change, regarding commitments, provides that:

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and "Scientific criteria for regulations" (art. 201). Section 2 of Part XIII on Marine Scientific Research of the United Nations Convention on the Law of the Sea provides for "International Cooperation", setting out "Promotion of international cooperation" (art. 242), "Creation of favourable conditions" (art. 243) and "Publication and dissemination of information and knowledge" (art. 244).

[119] Draft art. 7 provides that:

"In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors."

The articles were adopted by the Commission at its sixty-eighth session, in 2016, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/71/10), para. 48. In its resolution71/141 of 13 December 2016, the General Assembly took note of the draft articles, and invited Governments to submit comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles.

> "All Parties ... shall (e) Cooperate in preparing for adaptation to the impacts of climate change; ... (g) Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies; (h) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies; (i) Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations ..."

(11) The obligation to cooperate also includes, *inter alia*, the exchange of information. In this respect, it may also be noted that article 9 of the Convention on the Law of the Non-navigational Uses of International Watercourses has a detailed set of provisions on exchange of data and information. Moreover, the Convention on Long-Range Transboundary Air Pollution provides in article 4 that the Contracting Parties "shall exchange information on and review their policies, scientific activities and technical measures aimed at combating, as far as possible, the discharge of air pollutants which may have adverse effects, thereby contributing to the reduction of air pollution including long-range transboundary air pollution". The Convention also has detailed provisions on cooperation in the fields of research and development (art. 7); exchange of information (art. 8); and implementation and further development of the cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe (art. 9). Similarly, the Eastern Africa Regional Framework Agreement on Air Pollution (Nairobi Agreement, 2008)[120] and the West and Central Africa Regional Framework Agreement on Air Pollution (Abidjan Agreement, 2009)[121] have identical provisions on international cooperation. The parties agree to:

> "1.2 Consider the synergies and co-benefits of taking joint measures against the emission of air pollutants and greenhouse gases; 1.4 Promote the exchange of educational and research information on air quality management; 1.5 Promote regional cooperation to strengthen the regulatory institutions ..."

(12) The second sentence of draft article 17, paragraph 4, of the articles on the law of transboundary aquifers provides that: "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance". In turn, the draft articles on the protection of persons in the event of disaster, provides in draft article 9, that "[f]or the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources". Further, draft article 10 (Cooperation for risk reduction) provides that "[c]ooperation shall extend to the taking of measures intended to reduce the risk of disasters".

(13) In the context of protecting the atmosphere, enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation is considered key by the Commission.

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[120] Available at https://web.archive.org/web/20111226174901/http://www.unep.org/urban_environment/PDFs/EABAQ2008-AirPollutionAgreement.pdf.

[121] Available at https://web.archive.org/web/20111224143143/http://www.unep.org/urban_environment/PDFs/BAQ09_AgreementEn.Pdf.

Guideline 9
Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

Commentary

(1) Draft guideline 9 addresses "interrelationship among relevant rules"[122] and seeks to reflect the relationship between rules of international law relating to the protection of the atmosphere and other relevant rules of international law. Paragraphs 1 and 2 are general in nature, while paragraph 3 places emphasis on the protection of groups that are particularly vulnerable to atmospheric pollution and atmospheric degradation. Atmospheric pollution and atmospheric degradation are defined in draft guideline 1 on the use of terms. Those terms focus on pollution and degradation caused "by humans". That necessarily means that human activities governed by other fields of law have a bearing on the atmosphere and its protection. It is therefore important that conflicts and tensions between rules relating to the protection of the atmosphere and rules relating to other fields of international law are to the extent possible avoided. Accordingly, draft guideline 9 highlights the various techniques in international law for addressing tensions between legal rules and principles, whether they relate to a matter of interpretation or a matter of conflict. The formulation of draft guideline 9 draws upon the conclusions reached by the Commission's Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law.[123]

(2) Paragraph 1 addresses three kinds of legal processes, namely the identification of the relevant rules, their interpretation and their application. The phrase "and with a view to avoiding conflicts" at the end of the first sentence of the paragraph signals that "avoiding conflicts" is among one of the principal purposes of the paragraph. It is, however, not the exclusive purpose of the draft guideline. The paragraph is formulated in the passive form, in recognition of the fact that the process of identification, interpretation and application involves not only States but also international organizations, as appropriate.

(3) The phrase "should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations" draws upon the Commission's Study Group conclusions on fragmentation. The term "identified" is particularly relevant in

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[122] See draft art. 10 (on interrelationship) of resolution 2/2014 on the declaration of legal principles relating to climate change of the International Law Association, *Report of the Seventy-sixth Conference held in Washington D.C., August 2014* (London, 2014), p. 26.

[123] *Yearbook ... 2006*, vol. II (Part Two), para. 251. See conclusion (2) on "relationships of interpretation" and "relationships of conflict". See, for the analytical study, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1).

relation to rules arising from treaty obligations and other sources of international law. In coordinating norms, certain preliminary steps need to be taken that pertain to identification, for example, a determination of whether two norms address "the same subject matter", and which norm should be considered *lex generalis* or *lex specialis* and *lex anterior* or *lex posterior*, and whether the *pacta tertiis* rule applies. Moreover, when resorting to rules of customary international law for the purposes of interpretation, identification of customary international law itself is considered a prerequisite.

(4) The first sentence also makes specific reference to the principles of "harmonization and systemic integration", which were accorded particular attention in the conclusions of the work of the Study Group. As noted in conclusion (4) on harmonization, when several norms bear on a single issue they should, to the extent possible, be interpreted so as give rise to "a single set of compatible obligations". Moreover, under conclusion (17), systemic integration denotes that "whatever their subject matter, treaties are a creation of the international legal system". They should thus be interpreted against the background of other international rules and principles.

(5) The second sentence of paragraph 1 seeks to locate the paragraph within the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969,[124] including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law. Article 31, paragraph 3 (c), is intended to guarantee a "systemic interpretation", requiring "any relevant rules of international law applicable in the relations between the parties" to be taken into account.[125] In other words, article 31, paragraph 3 (c), of the 1969 Vienna Convention emphasizes both the "unity of international law" and "the sense in which rules should not be considered in isolation of general international law".[126] Article 30 of the 1969 Vienna Convention provides rules to resolve a conflict, if the above principle of systemic integration does not work effectively in a given circumstance. Article 30 provides for conflict rules of *lex specialis* (para. 2), of *lex posterior* (para. 3) and of *pacta tertiis* (para. 4).[127] The phrase "principles and rules of customary international law" in the second sentence of paragraph 1 covers such principles and rules of customary international law as are relevant to the identification, interpretation and application of relevant rules.[128]

(6) The reference to "including *inter alia* the rules of international trade and investment law, of the law of the sea and of international human rights law" highlights the practical importance of these three areas in their relation to the protection of the atmosphere. The specified areas have close connection with the rules of international law relating to the protection of the atmosphere in terms of treaty practice, jurisprudence and doctrine.[129] Other fields of law, which might be equally relevant, have not been overlooked and the list of relevant fields of law is not intended to be exhaustive. Furthermore, nothing in draft

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[124] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[125] See, e.g., WTO, Appellate Body report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, para. 158. See also *Al-Adsani v. the United Kingdom*, Application No. 35763/97, ECHR 2001-XI, para. 55.

[126] P. Sands, "Treaty, custom and the cross-fertilization of international law", *Yale Human Rights and Development Law Journal*, vol. 1 (1998), p. 95, para. 25; C. McLachlan, "The principle of systemic integration and article 31 (3) (c) of the Vienna Convention", *International and Comparative Law Quarterly*, vol. 54 (2005), p. 279; O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1 (Oxford, Oxford University Press, 2011), pp. 828–829.

[127] *Ibid.*, pp. 791–798.

[128] It may be noted that the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Marrakesh Agreement establishing the World Trade Organization, United Nations, *Treaty Series*, vol. 1869, No. 31874, p. 3, annex 2, p. 401) provides in art. 3, para. 2, that "[t]he dispute settlement system of the WTO … serves … to clarify the existing provisions of those [covered] agreements in accordance with *customary* rules of interpretation of public international law" (emphasis added).

[129] See International Law Association, *Report of the Seventy-sixth Conference held in Washington* … (footnote 122 above); and A. Boyle, "Relationship between international environmental law and other branches of international law", in *The Oxford Handbook of International Environmental Law*, Bodansky *et al.* (footnote 19 above), pp. 125–146.

guideline 9 should be interpreted as subordinating rules of international law in the listed fields to rules relating to the protection of the atmosphere and vice-versa.

(7) With respect to international trade law, the concept of mutual supportiveness has emerged to help reconcile that law and international environmental law, which relates in part to protection of the atmosphere. The Marrakesh Agreement establishing the World Trade Organization[130] of 1994 provides, in its preamble, that its aim is to reconcile trade and development goals with environmental needs "in accordance with the objective of sustainable development".[131] The WTO Committee on Trade and Environment began pursuing its activities "with the aim of making international trade and environmental policies mutually supportive",[132] and in its 1996 report to the Singapore Ministerial Conference, the Committee reiterated its position that the WTO system and environmental protection are "two areas of policy-making [that] are both important and … should be mutually supportive in order to promote sustainable development".[133] As the concept of "mutual supportiveness" has become gradually regarded as "a legal standard *internal* to the WTO",[134] the 2001 Doha Ministerial Declaration expresses the conviction of States that "acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".[135] Mutual supportiveness is considered in international trade law as part of the principle of harmonization in interpreting conflicting rules of different treaties. Among a number of relevant WTO dispute settlement cases, the *United States — Standards for Reformulated and Conventional Gasoline* case in 1996 is most notable in that the Appellate Body refused to separate the rules of the General Agreement on Tariffs and Trade from other rules of interpretation in public international law, by stating that "the *General Agreement* is not to be read *in clinical isolation from public international law*" (emphasis added),[136] strongly supporting the interpretative principle of harmonization and systemic integration.

(8) Similar trends and approaches appear in international investment law. Free trade agreements, which contain a number of investment clauses, such as the North American Free Trade Agreement,[137] and numerous bilateral investment treaties[138] also contain

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[130] United Nations, *Treaty Series*, vols. 1867–1869, No. 31874.

[131] *Ibid.*, vol. 1867, No. 31874, p. 154.

[132] Trade Negotiations Committee, decision of 14 April 1994, MTN.TNC/45(MIN), annex II, p. 17.

[133] WTO, Committee on Trade and Environment, Report (1996), WT/CTE/1 (12 November 1996), para. 167.

[134] J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, United Kingdom, Cambridge University Press, 2003); R. Pavoni, "Mutual supportiveness as a principle of interpretation and law-making: a watershed for the 'WTO-and-competing regimes' debate?", *European Journal of International Law*, vol. 21, No. 3 (2010), pp. 651–652. See also S. Murase, "Perspectives from international economic law on transnational environmental issues", *Collected Courses of The Hague Academy of International Law*, vol. 253 (Leiden, Martinus Nijhoff, 1996), pp. 283–431, reproduced in S. Murase, *International Law: An Integrative Perspective on Transboundary Issues* (Tokyo, Sophia University Press, 2011), pp. 1–127; and S. Murase, "Conflict of international regimes: trade and the environment", *ibid.*, pp. 130–166.

[135] Adopted on 14 November 2001 at the fourth session of the WTO Ministerial Conference in Doha, WT/MIN(01)/DEC/1, para. 6. The Hong Kong Ministerial Declaration of 2005 reaffirmed that "the mandate in paragraph 31 of the Doha Ministerial Declaration aimed at enhancing the mutual supportiveness of trade and environment …" (adopted on 18 December 2005 at the sixth session of the Ministerial Conference in Hong Kong, China, WT/MIN(05)/DEC, para. 31).

[136] WTO, Appellate Body report, *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17. See also S. Murase, "Unilateral measures and the WTO dispute settlement" (discussing the *Gasoline* case), in *Asian Dragons and Green Trade: Environment, Economics and International Law*, S.C. Tay and D.C. Esty (eds.) (Singapore, Times Academic Press, 1996), pp. 137–144.

[137] North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (Washington D.C., United States Government Printing Office, 1993). Note, in particular, arts. 104, para. 1, and 1114.

[138] There are various model bilateral investment treaties (BITs), such as: Canada Model BIT of 2004, available at www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf; Colombia Model BIT of 2007, available at www.italaw.com/documents/inv_model_bit_colombia.pdf; United States Model BIT of 2012, available at www.italaw.com/sites/default/files/archive/ita1028.pdf; Model International

standards relating to the environment, which have been confirmed by the jurisprudence of the relevant dispute settlement bodies. Some investment tribunals have emphasized that investment treaties "cannot be read and interpreted in isolation from public international law".[139]

(9) The same is the case with the law of the sea. The protection of the atmosphere is intrinsically linked to the oceans and the law of the sea owing to the close physical interaction between the atmosphere and the oceans. The Paris Agreement notes in its preamble "the importance of ensuring the integrity of all ecosystems, including oceans". This link is also borne out by the United Nations Convention on the Law of the Sea of 1982,[140] which defines the "pollution of the marine environment", in article 1, paragraph 1 (4), in such a way as to include all airborne sources of marine pollution, including atmospheric pollution from land-based sources and vessels.[141] It offers detailed provisions on the protection and preservation of the marine environment through Part XII, in particular articles 192, 194, 207, 211 and 212. There are a number of regional conventions regulating marine pollution from land-based sources.[142] IMO has sought to regulate vessel-source pollution in its efforts to supplement the provisions of the Convention[143] and to combat climate change.[144] The effective implementation of the applicable rules of the law of the sea

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Agreement on Investment for Sustainable Development of the International Institute for Sustainable Development (IISD) of 2005, in H. Mann *et al.*, *IISD Model International Agreement on Investment for Sustainable Development* (2nd ed.) (Winnipeg, 2005), art. 34, available from www.iisd.org/pdf/2005/investment_model_int_agreement.pdf. See also United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (2015), pp. 91–121, available at http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf; P. Muchlinski, "Negotiating new generation international investment agreements: new sustainable development-oriented initiatives", in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, S. Hindelang and M. Krajewski (eds.) (Oxford, Oxford University Press, 2016), pp. 41–64.

[139] *Phoenix Action Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, award, 15 April 2009, para. 78.

[140] Prior to the Convention, the only international instrument of significance was the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Moscow, 5 August 1963, United Nations, *Treaty Series*, vol. 480, No. 6964, p. 43).

[141] M.H. Nordquist *et al.* (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Dordrecht, Martinus Nijhoff, 1991), pp. 41–42.

[142] For example, the Convention for the Protection of the Marine Environment of the North-East Atlantic (United Nations, *Treaty Series*, No. 42279, p. 67, at p. 71, art. 1 (e)); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 9 April 1992, *ibid.*, vol. 1507, No. 25986, p. 166, at p. 169, art. 2, para. 2); the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (*ibid.*, vol. 1328, No. 22281, p. 105, at p. 121, art. 4, para. 1 (b)); the Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources (Quito, 22 July 1983, *ibid.*, vol. 1648, No. 28327, p. 73, at p. 90, art. II (c)); and the Protocol for the Protection of the Marine Environment against Pollution from Land-based Sources to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait, 21 February 1990, *ibid.*, vol. 2399, No. 17898, p. 3, at p. 40, art. III).

[143] For example, at the fifty-eighth session of the Marine Environment Protection Committee in 2008, IMO adopted annex VI, as amended, to the International Convention for the Prevention of Pollution from Ships (*ibid.*, vol. 1340, No. 22484, p. 61), which regulates, *inter alia*, emissions of SO_x and NO_x. The Convention now has six annexes, namely, annex I on regulations for the prevention of pollution by oil (entry into force on 2 October 1983); annex II on regulations for the control of pollution by noxious liquid substances in bulk (entry into force on 6 April 1987); annex III on regulations for the prevention of pollution by harmful substances carried by sea in packaged form (entry into force on 1 July 1992); annex IV on regulations for the prevention of pollution by sewage from ships (entry into force on 27 September 2003); annex V on regulations for the prevention of pollution by garbage from ships (entry into force on 31 December 1988); and annex VI on regulations for the prevention of air pollution from ships (entry into force on 19 May 2005).

[144] S. Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organization* (Dordrecht, Springer, 2015), pp. 107–126; S. Karim and S. Alam, "Climate change and reduction of emissions of greenhouse gases from ships: an appraisal", *Asian Journal of International Law*, vol. 1 (2011), pp. 131–148; Y. Shi, "Are greenhouse gas emissions from international shipping a type of marine pollution?" *Marine Pollution Bulletin*, vol.

could help to protect the atmosphere. Similarly, the effective implementation of the rules on the protection of the environment could protect the oceans.

(10) As for international human rights law, environmental degradation, including air pollution, climate change and ozone layer depletion, "has the potential to affect the realization of human rights".[145] The link between human rights and the environment, including the atmosphere, is acknowledged in the practice. The Stockholm Declaration recognizes, in its principle 1, that everyone "has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being".[146] The Rio Declaration of 1992 outlines, in its principle 1, that "[h]uman beings are at the centre of concerns for sustainable development", and that "[t]hey are entitled to a healthy and productive life in harmony with nature".[147] In the context of atmospheric pollution, the Convention on Long-range Transboundary Air Pollution recognizes that air pollution has "deleterious effects of such a nature as to endanger human health" and provides that the parties are determined "to protect man and his environment against air pollution" of a certain magnitude.[148] Likewise, for atmospheric degradation, the Vienna Convention for the Protection of the Ozone Layer contains a provision whereby the parties are required to take appropriate measures "to protect human health" in accordance with the Convention and Protocols to which they are a party.[149] Similarly, the United Nations Framework Convention on Climate Change deals with the adverse effects of climate change, including significant deleterious effects "on human health and welfare".[150]

(11) In this regard, relevant human rights are "the right to life",[151] "the right to private and family life"[152] and "the right to property".[153] Where a specific right to environment exists in human rights conventions, the relevant courts and treaty bodies apply them, including the right to health. In order for international human rights law to contribute to the protection of the atmosphere, however, certain core requirements must be fulfilled.[154] First,

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113 (2016), pp. 187–192; J. Harrison, "Recent developments and continuing challenges in the regulation of greenhouse gas emissions from international shipping" (2012), Edinburgh School of Law Research Paper No. 2012/12, p. 20. Available from https://ssrn.com/abstract=2037038 (accessed 7 July 2017).

145 Analytical study on the relationship between human rights and the environment: report of the United Nations High Commissioner for Human Rights (A/HRC/19/34), para. 15. See also Human Rights Council resolution 19/10 of 19 April 2012 on human rights and the environment.

146 See L.B. Sohn, "The Stockholm Declaration on the Human Environment" (footnote 23 above), at pp. 451–455.

147 F. Francioni, "Principle 1: human beings and the environment", in *The Rio Declaration on Environment and Development: A Commentary*, J.E. Viñuales (ed.) (Oxford, Oxford University Press, 2015), pp. 93–106, at pp. 97–98.

148 United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217, at p. 219, arts. 1 and 2.

149 *Ibid.*, vol. 1513, No. 26164, p. 293, at p. 326, art. 2.

150 Art. 1.

151 Art. 6 of the International Covenant on Civil and Political Rights of 1966 (New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171); art. 6 of the Convention on the Rights of the Child of 1989 (New York, 20 December 1989, *ibid.*, vol. 1577, No. 27531, p. 3); art. 10 of the Convention on the Rights of Persons with Disabilities of 2006 (New York, 20 December 2006, *ibid.*, vol. 2515, No. 44910, p. 3); art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Rome, 4 November 1950, *ibid.*, vol. 213, No. 2889, p. 221, hereinafter, "European Convention on Human Rights"); art. 4 of the American Convention on Human Rights of 1969 (San José, 22 November 1969, *ibid.*, vol. 1144, No. 14668, p. 171); and art. 4 of the African Charter on Human and Peoples' Rights of 1981 (Nairobi, 27 June 1981, *ibid.*, vol. 1520, No. 26363, p. 217).

152 Art. 17 of the International Covenant on Civil and Political Rights; art. 8 of the European Convention on Human Rights; and art. 11, para. 2, of the American Convention on Human Rights.

153 Art. 1 of Protocol No. 1 to the European Convention on Human Rights (*ibid.*, vol. 213, No. 2889, p. 221); art. 21 of the American Convention on Human Rights; and art. 14 of the African Charter on Human and Peoples' Rights. See D. Shelton, "Human rights and the environment: substantive rights" in *Research Handbook on International Environmental Law*, M. Fitzmaurice, D.M. Ong and P. Merkouris (eds.) (Cheltenham, Edward Elgar, 2010), pp. 267–283, at pp. 267, 269–278.

154 P.-M. Dupuy and J.E. Viñuales, *International Environmental Law* (Cambridge, United Kingdom, Cambridge University Press, 2015), pp. 320–329.

as international human rights law remains "a personal-injury-based legal system",[155] a direct link between atmospheric pollution or degradation that impairs the protected right and an impairment of a protected right must be established. Second, the adverse effects of atmospheric pollution or degradation must attain a certain threshold if they are to fall within the scope of international human rights law. The assessment of such minimum standards is relative and depends on the content of the right to be invoked and all the relevant circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects. Third, and most importantly, it is necessary to establish the causal link between an action or omission of a State, on the one hand, and atmospheric pollution or degradation, on the other hand.

(12) One of the difficulties in the interrelationship between the rules of international law relating to the atmosphere and human rights law is the "disconnect" in their application. While the rules of international law relating to the atmosphere apply not only to the States of victims but also to the States of origin of the harm, the scope of application of human rights treaties is limited to the persons subject to a State's jurisdiction.[156] Thus, where an environmentally harmful activity in one State affects persons in another State, the question of the interpretation of "jurisdiction" in the context of human rights obligations arises. In interpreting and applying the notion, regard may be had to the object and purpose of human rights treaties. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice pronounced, when addressing the issue of extraterritorial jurisdiction, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions".[157]

(13) One possible consideration is the relevance of the principle of non-discrimination. Some authors maintain that it may be considered unreasonable that international human rights law would have no application to atmospheric pollution or global degradation and that the law can extend protection only to the victims of intra-boundary pollution. They maintain that the non-discrimination principle requires the responsible State to treat transboundary atmospheric pollution or global atmospheric degradation no differently from domestic pollution.[158] Furthermore, if and insofar as the relevant human rights norms are today recognized as either established or emergent rules of customary international law,[159] they may be considered as overlapping with environmental norms for the protection of the atmosphere, such as due diligence (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization (draft guideline 5), equitable and reasonable utilization (draft guideline 6) and international cooperation (draft guideline 8), among others, which would enable interpretation and application of both norms in a harmonious manner.

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[155] *Ibid.*, pp. 308–309.

[156] Art. 2 of the International Covenant on Civil and Political Rights; art. 1 of the European Convention on Human Rights; and art. 1 of the American Convention on Human Rights. See A. Boyle, "Human rights and the environment: where next?", *European Journal of International Law*, vol. 23 (2012), pp. 613–642, at pp. 633–641.

[157] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[158] Boyle, "Human rights and the environment" (see footnote 156 above), pp. 639–640.

[159] B. Simma and P. Alston, "Sources of human rights law: custom, *jus cogens* and general principles", *Australian Year Book of International Law*, vol. 12 (1988), pp. 82–108; V. Dimitrijevic, "Customary law as an instrument for the protection of human rights", Working Paper, No. 7 (Milan, Istituto Per Gli Studi Di Politica Internazionale (ISPI), 2006), pp. 3–30; B. Simma, "Human rights in the International Court of Justice: are we witnessing a sea change?", in *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy*, D. Alland *et al.* (eds.) (Leiden, Martinus Nijhoff, 2014), pp. 711–737; and H. Thirlway, "International law and practice: human rights in customary law: an attempt to define some of the issues," *Leiden Journal of International Law*, vol. 28 (2015), pp. 495–506.

(14) In contrast to paragraph 1, which addresses identification, interpretation and application, paragraph 2 deals with the situation in which States wish to develop new rules. The paragraph signals a general desire to encourage States, when engaged in negotiations involving the creation of new rules, to take into account the systemic relationships that exist between rules of international law relating to the atmosphere and rules in other legal fields.

(15) Paragraph 3 highlights the plight of those in vulnerable situations because of atmospheric pollution and atmospheric degradation. It has been formulated to make a direct reference to atmospheric pollution and atmospheric degradation. The reference to paragraphs 1 and 2 captures both the aspects of "identification, interpretation and application", on the one hand, and "development", on the other hand. The phrase "special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation" underlines the broad scope of the consideration to be given to the situation of vulnerable groups, covering both aspects of the present topic, namely "atmospheric pollution" and "atmospheric degradation". It was not considered useful to refer in the text to "human rights", or even to "rights" or "legally protected interest".

(16) The second sentence of paragraph 3 gives examples of groups that may be found in vulnerable situations in the context of atmospheric pollution and atmospheric degradation. The World Health Organization has noted that: "All populations will be affected by a changing climate, but the initial health risks vary greatly, depending on where and how people live. People living in small island developing States and other coastal regions, megacities, and mountainous and polar regions are all particularly vulnerable in different ways."[160] In the Sustainable Development Goals adopted by the General Assembly in its 2030 Agenda for Sustainable Development, atmospheric pollution is addressed in Goals 3.9 and 11.6, which call, in particular, for a substantial reduction in the number of deaths and illnesses from air pollution, and for special attention to ambient air quality in cities.[161]

(17) The phrase in the second sentence of paragraph 3 "may include, *inter alia*" denotes that the given examples are not necessarily exhaustive. Indigenous peoples are, as was declared in the Report of the Indigenous Peoples' Global Summit on Climate Change, "the most vulnerable to the impacts of climate change because they live in the areas most affected by climate change and are usually the most socio-economically disadvantaged".[162] People of the least developed countries are also placed in a particularly vulnerable situation as they often live in extreme poverty, without access to basic infrastructure services and to adequate medical and social protection.[163] People of low-lying areas and small-island developing States affected by sea-level rise are subject to the potential loss of land, leading to displacement and, in some cases, forced migration. Inspired by the preamble of the Paris Agreement, in addition to the groups specifically indicated in paragraph 3 of draft guideline 9, other groups of potentially particularly vulnerable people include local communities,

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[160] World Health Organization, *Protecting Health from Climate Change: Connecting Science, Policy and People* (Geneva, 2009), p. 2.

[161] See B. Lode, P. Schönberger and P. Toussaint, "Clean air for all by 2030? Air quality in the 2030 Agenda and in international law", *Review of European, Comparative and International Environmental Law*, vol. 25 (2016), pp. 27–38. See also the indicators for these targets specified in 2016 (3.9.1: mortality rate attributed to household and ambient air pollution; and 11.6.2: annual mean levels of fine particulate matter in cities).

[162] "Report of the Indigenous Peoples' Global Summit on Climate Change, 20–24 April 2009, Anchorage, Alaska", p. 12, available from www.un.org/ga/president/63/letters/globalsummitoncc.pdf#search=%27 (accessed 7 July 2017). See R.L. Barsh, "Indigenous peoples", in *The Oxford Handbook of International Environmental Law*, Bodansky *et al.* (footnote 19 above), pp. 829–852; B. Kingsbury, "Indigenous peoples", in *The Max Planck Encyclopedia of Public International Law*, R. Wolfrum, (ed.) (Oxford, Oxford University Press, 2012), vol. V, pp. 116–133; and H.A. Strydom, "Environment and indigenous peoples", in (ed.), *The Max Planck Encyclopedia of Public International Law*, R. Wolfrum (ed.) (Oxford, Oxford University Press, 2012), vol. III, pp. 455–461.

[163] World Bank Group Climate Change Action Plan, 7 April 2016, para. 104, available from http://pubdocs.worldbank.org/en/677331460056382875/WBG-Climate-Change-Action-Plan-public-version.pdf (accessed 7 July 2017).

migrants, women, children, persons with disabilities and also the elderly, who are often seriously affected by atmospheric pollution and atmospheric degradation.[164]

Guideline 10
Implementation

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.

2. States should endeavour to give effect to the recommendations contained in the present draft guidelines.

Commentary

(1) Draft guideline 10 deals with implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. The use of the term "implementation" is not necessarily uniform in agreements, or in literature. The term "implementation" is used in the present draft guideline to refer to measures that States may take to make treaty provisions effective at the national level, including implementation in their national laws.[165]

(2) Draft guideline 10 consists of two paragraphs, which address, on one hand, existing obligations under international law, and on the other hand, recommendations contained in the draft guidelines.

(3) The draft guidelines refer to certain obligations of States under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, namely, the obligation to protect the atmosphere (draft guideline 3), the obligation to ensure that an environmental impact assessment is carried out (draft guideline 4) and the obligation to cooperate (draft guideline 8).[166] Given that States have these obligations, it is a logical and intrinsic consequence that they should faithfully be implemented.

(4) The term "[n]ational implementation" denotes the measures that parties may take to make international agreements operative at their national level.[167] All these forms of implementation are regulated by the national constitution and legal system of each State. The text of paragraph 1 reflects the idea that States may implement their obligations

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[164] The Committee on the Elimination of Discrimination against Women has an agenda on "gender-related dimensions of disaster risk reduction and climate change"; see http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ClimateChange.aspx (accessed 7 July 2017). Along with women and children, the elderly and persons with disabilities are usually mentioned as vulnerable people. See World Health Organization, *Protecting Health from Climate Change* ... (footnote 160 above) and the World Bank Group Climate Change Action Plan (footnote 163 above). The Inter-American Convention on Protecting the Human Rights of Older Persons of 2015 (*General Assembly of the Organization of American States, Forty-fifth Regular Session, Proceedings*, vol. I (OEA/Ser.P/XLV-O.2), pp. 11–38) provides, in article 25 (right to a healthy environment), that: "Older persons have the right to live in a healthy environment with access to basic public services. To that end, States Parties shall adopt appropriate measures to safeguard and promote the exercise of this right, inter alia: a. To foster the development of older persons to their full potential in harmony with nature; b. To ensure access for older persons, on an equal with others, to basic public drinking water and sanitation services, among others."

[165] See generally, P. Sands and J. Peel, *Principles of International Environmental Law*, 3rd ed. (Cambridge: Cambridge University Press, 2012), pp. 135–183; E. Brown Weiss and H.K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, (Cambridge, Massachusetts: MIT Press, 1998), see "A framework for analysis", pp. 1–18, at p. 4.

[166] Even the obligation to cooperate sometimes requires national implementation. According to draft guideline 8, paragraph 2, "[c]ooperation could include exchange of information and joint monitoring", which normally require national implementing legislation.

[167] C. Redgwell, "National implementation", in *The Oxford Handbook of International Environmental Law*, Bodansky *et al.* (footnote 19 above), p. 925.

without being limited to implementation in their national law as such. "National implementation" takes various forms in which obligations under international law may be implemented. This would also apply to situations in which obligations of regional organizations such as the European Union may be implicated.[168]

(5) The use of the term "obligations" in paragraph 1 has to be understood as clearly not intended to impose new obligations on States or create new obligations for them, but rather refers to existing obligations that States already have under international law. Thus, the phrase "including those [obligations] referred to in the present draft guidelines" was chosen, and the expression "referred to" highlights the fact that the draft guidelines do not create new obligations and are not comprehensive of the various issues related to the topic.

(6) National implementation may take many forms, and the word "may" was added to reflect the elective nature of the provision. If national implementation is indeed required, it "may" take different forms, including in "the form of legislative, administrative, judicial and other actions". The reference to "administrative" actions was used rather than "executive" actions, as it was considered that "administrative" was more encompassing in that it also covered possible implementation at lower levels of governmental administration. In any event, the term "other actions" at the end of the sentence would be a residual category covering all other forms of national implementation.

(7) The reference to "the recommendations contained in the present draft guidelines" in paragraph 2 is intended to distinguish such recommendations from "obligations" as referred to in paragraph 1. The expression "recommendations", although not entirely felicitous, was considered appropriate as it would be consistent with the draft guidelines, which use the term "should" in their formulation,[169] and would not dilute any normative content of any of the draft guidelines. Paragraph 2 requires that States should endeavour to give effect to the recommendations contained in the draft guidelines.

(8) The Commission decided not to include a draft guideline on the subject of the responsibility of States for internationally wrongful acts as originally proposed by the Special Rapporteur.[170] In the main, it was considered that the secondary rules of responsibility was a subject that the Commission had already had an occasion to elaborate upon, adopting in 2001 the articles on responsibility of States for internationally wrongful acts.[171] Accordingly, those rules would apply, *mutatis mutandis*, in relation to environmental matters, including protection of the atmosphere from atmospheric pollution and atmospheric degradation. Even though the Special Rapporteur noted that some States had indicated the issue of responsibility should be addressed squarely, and further that the element of "harm" (damage and risk) to be proven by "clear and convincing evidence"[172] would be relevant for determining the questions, for instance, of standing and reparations, a matter determined by primary rules,[173] the Commission has taken the view that a paragraph on the subject, even if it were framed as a without prejudice clause, would unbalance the text of the draft guidelines.

(9) Moreover, even though States sometimes resort to extraterritorial application of national law to the extent permissible where there is a well-founded grounding in

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[168] See, L. Krämer, "Regional economic integration organizations: the European Union as an example", in *The Oxford Handbook of International Environmental Law*, Bodansky *et al.* (footnote 19 above), pp. 853–876 (on implementation, pp. 868–870).

[169] See, for example, draft guidelines 5, 6, 7, 9, and 12, para. 2.

[170] The proposal by the Special Rapporteur read as follows: "Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law, if the actions or omissions are attributable to the States and the damage or risk is proven by clear and convincing evidence." See the fifth report of the Special Rapporteur (A/CN.4/711), para. 31.

[171] For the articles adopted by the Commission and the commentaries thereto, see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

[172] See *Trail Smelter* arbitration (footnote 71 above), at p. 1965.

[173] P. Okowa, "Responsibility for environmental damage", in *Research Handbook on International Environmental Law*, Fitzmaurice, Ong and Merkouris (eds.) (footnote 153 above), pp. 303–319, at p. 312; see also Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford, Oxford University Press, 2000), pp. 171–202.

international law,[174] the Commission did not consider it necessary to address the matter for the purposes of the present draft guidelines, as originally proposed by the Special Rapporteur.[175] The Commission considered that the matter of extraterritorial application of national law by a State raised a host of complex questions with far-reaching implications for other States and for their relations with each other.[176]

Guideline 11
Compliance

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.

2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:

(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

Commentary

(1) Draft guideline 11, which complements draft guideline 10 on national implementation, refers to compliance at the level of international law. The use of the term "compliance" is not necessarily uniform in agreements, or in literature. The term "compliance" is used in the present draft guideline to refer to mechanisms or procedures *at the level of international law* that verify whether States in fact adhere to the provisions of an agreement. Paragraph 1 is intended to reinforce the principle *pacta sunt servanda*. Thus, it stipulates that "States are required to abide with obligations under international law" in good faith, while further specifying a linkage to obligations under international law concerning the "protection of the atmosphere from atmospheric pollution and atmospheric degradation". The purpose of the formulation "obligations under international law"

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[174] The relevant precedents of extraterritorial application of national law include: (a) the *Trail Smelter* arbitration (article IV of the 1935 Convention for the settlement of difficulties arising from operation of smelter at Trail required to apply "the law and practice followed in dealing with cognate questions in the United States of America…", UNRIAA (see footnote 71 above), pp. 1905–1982 (Award of 1941), at p. 1965); (b) *Tuna-Dolphin* cases under the General Agreement on Tariffs and Trade (The "extra-jurisdictional application" of the United States Marine Mammal Protection Act not being consistent with article XX of the General Agreement, Panel report, *United States — Restrictions on Imports of Tuna*, DS21/R-39S/155, 3 September 1991 (Tuna-Dolphin-I, not adopted), paras. 5.27–5.29; General Agreement on Tariffs and Trade, Panel report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994 (Tuna-Dolphin II, not adopted), para. 5.32.); (c) WTO *Gasoline* case (On the extraterritorial application of the United States Clean Air Act, WTO, Appellate Body report, *United States – Standards of Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 22 April 1996; (d) European Court of Justice judgment, *Air Transport Association of America and Others* v. *Secretary of State for Energy and Climate*, 21 December 2011 (On the extraterritorial application of the European Union Aviation Directive 2008/101/EC); (e Singapore Transboundary Haze Pollution Act of 2014, providing for extraterritorial jurisdiction based on the "objective territorial principle" (Parliament of Singapore, *Official Reports*, No. 12, Session 2, 4 August 2014, paras. 5–6).

[175] The proposal by the Special Rapporteur read as follows: "The extraterritorial application of national law by a State is permissible when there is a well-founded grounding in international law. It should be exercised with care, taking into account comity among the States concerned. The extraterritorial enforcement of national law by a State should not be exercised in any circumstance." See the Special Rapporteur's fifth report (A/CN.4/711), para. 31.

[176] See Murase, "Perspectives from international economic law on transnational environmental issues" (footnote 134 above), at pp. 349–372.

regarding the protection of the atmosphere is to harmonize the form used, in paragraph 1, with the language used throughout the draft guidelines. The broad nature of the formulation "obligations under international law" was considered to also better account for the reality that treaty rules constituting obligations may, in some cases, be binding only on the parties to the relevant agreements, while others may reflect or later crystallize into customary international law with consequent legal effects for non-parties. The phrase "relevant agreements" to which the States are parties has been used to avoid narrowing the scope of the provision only to multilateral environmental agreements, when such obligations can exist in other agreements.[177] The general character of paragraph 1 also appropriately serves as an introduction to paragraph 2.

(2) Paragraph 2 deals with the facilitative or enforcement procedures that may be used by compliance mechanisms.[178] The opening phrase of the chapeau "[t]o achieve compliance" provides a purposive positive approach, with its wording aligned with formulations in existing agreements addressing compliance mechanisms. The phrase "may be used, as appropriate" emphasizes the differing circumstances and contexts in which facilitative or enforcement procedures could be deployed to help foster compliance. The disjunctive word "or" indicates that facilitative or enforcement procedures are to be considered as alternatives by the competent organ established under the agreement concerned. The phrase "in accordance with the relevant agreements" is used at the end of the chapeau, so as to emphasize that facilitative or enforcement procedures are those provided for under existing agreements to which States are parties, and that these procedures will operate in accordance with such existing agreements.

(3) Besides the chapeau, paragraph 2 comprises two subparagraphs, (a) and (b). In both subparagraphs, the word "may" has been used before "include" to provide States and the competent organ established under the agreement concerned with flexibility to use existing facilitative or enforcement procedures.

(4) Subparagraph (a) employs the expression "in cases of non-compliance"[179] and refers to "the States concerned", avoiding the expression "non-complying States". Facilitative procedures may include providing "assistance" to States, since those States are willing to comply but unable to do so for lack of capacity. Thus, facilitative measures are provided in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned

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[177] This reflection of State practice would include multilateral or regional or other trade agreements, for example, that may also contemplate environmental protection provisions including exceptions such as those under article XX of the General Agreement on Tariffs and Trade or even so-called environmental "side agreements", such as the North American Agreement on Environmental Cooperation.

[178] Non-compliance procedures have been widely adopted in multilateral environmental agreements relating to the protection of the atmosphere, including the following: (a) Convention on Long-range Transboundary Air Pollution and its subsequent Protocols (United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217): see E. Milano, "Procedures and mechanisms for review of compliance under the 1979 Long-Range Transboundary Air Pollution Convention and its Protocols", in *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, T. Treves *et al.* (eds.) (The Hague, T.M.C. Asser Press, 2009), pp. 169–180; (b) the Montreal Protocol on the Substances that Deplete the Ozone Layer (United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 3, and UNEP/OzL.Pro.4/15); F. Lesniewska, "Filling the holes: the Montreal Protocol's non-compliance mechanisms", in *Research Handbook on International Environmental Law*, Fitzmaurice, Ong and Merkouris (eds.) (footnote 153 above), pp. 471–489; (c) Convention on Environmental Impact Assessment in a Transboundary Context; (d) Kyoto Protocol to the United Nations Framework Convention on Climate Change, and decision 24/CP.7 (FCCC/CP/2001/13/Add.3); J. Brunnée, "Climate change and compliance and enforcement processes", in R. Rayfuse and S.V. Scott (eds.), *International Law in the Era of Climate Change* (Cheltenham: Edward Elgar, 2012), pp. 290–320; (e) the Paris Agreement under the United Nations Framework Convention on Climate Change (FCCC/CP/2015/10/Add.1, annex); D. Bodansky, "The Paris Climate Change Agreement: a new hope?", *American Journal of International Law*, vol. 110 (2016), pp. 288–319).

[179] This is based on the Montreal Protocol on Substances that Deplete the Ozone Layer, which in art. 8 uses the phrase "Parties found to be in non-compliance" (United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 40).

are assisted to comply with their obligations under international law.[180] The last part of that sentence, which references "taking into account their capabilities and special conditions", was considered necessary, in recognition of the specific challenges that developing and least developed countries often face in the discharge of obligations relating to environmental protection. This is due to, most notably, general lack of capacity, which can sometimes be mitigated through receipt of external support enabling capacity-building to facilitate compliance with their obligations under international law.

(5) Subparagraph (b) provides for enforcement procedures, which may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.[181] Enforcement procedures, in contrast to facilitative procedures, aim to achieve compliance by imposing a penalty on the State concerned in case of non-compliance. At the end of the sentence, the term "enforcement measures" was employed rather than the term "sanctions" in order to avoid any confusion with the possibly negative connotation associated with the term "sanctions". The enforcement procedures referred to in subparagraph (b) should be distinguished from any invocation of international responsibility of States, hence these procedures should be adopted only for the purpose of leading the States concerned to return to compliance in accordance with the relevant agreements as referred to in the chapeau.[182]

Guideline 12
Dispute settlement

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.

2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.

Commentary

(1) Draft guideline 12 concerns dispute settlement. Paragraph 1 describes the general obligation of States to settle their disputes by peaceful means. The expression "between States" clarifies that the disputes being referred to in the paragraph are inter-State in nature. The paragraph omits the often quoted reference to Article 33, paragraph 1, of the Charter of the United Nations, but the intent is not to downplay the significance of the various pacific means of settlement mentioned in that provision, such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to other peaceful means that may be

[180] M. Koskenniemi, "Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol", *Yearbook of International Environmental Law*, vol. 3 (1992), pp. 123–162; D.G. Victor, "The operation and effectiveness of the Montreal Protocol's non-compliance procedure", in Victor, K. Raustiala and E.B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge, Massachusetts, MIT Press, 1998), pp. 137–176; O. Yoshida, *The International Legal Régime for the Protection of the Stratospheric Ozone Layer* (The Hague, Kluwer Law International, 2001), pp. 178–179; Dupuy and Viñuales, *International Environmental Law* (footnote 154 above), p. 285 *et seq.*

[181] G. Ulfstein and J. Werksman, "The Kyoto compliance system: towards hard enforcement", in O. Schram Stokke, J. Hovi and G. Ulfstein (eds.), *Implementing the Climate Change Regime: International Compliance* (London, Earthscan, 2005), pp. 39–62; S. Urbinati, "Procedures and mechanisms relating to compliance under the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change", in *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, Treves *et al.* (footnote 178 above), pp. 63–84; S. Murase, "International lawmaking for the future framework on climate change: a WTO/GATT Model", in *International Law: An Integrative Perspective on Transboundary Issues*, Murase (footnote 134 above), pp. 173–174.

[182] G. Loibl, "Compliance procedures and mechanisms", in *Research Handbook on International Environmental Law*, Fitzmaurice, Ong and Merkouris (eds.) (see footnote 153 above), pp. 426–449, at pp. 437–439.

preferred by the States concerned, nor the principle of choice of means.[183] Paragraph 1 is not to be construed in any way as interfering with or displacing existing dispute settlement provisions in treaty regimes, which will continue to operate in their own terms. The main purpose of the present paragraph is to reaffirm the principle of peaceful settlement of disputes[184] and to serve as a primer for paragraph 2.

(2) The first part of the sentence of paragraph 2 recognizes that disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation would be "fact-intensive" and "science-dependent". As scientific input has been emphasized in the process of progressive development of international law relating to the protection of the atmosphere,[185] likewise, more complicated scientific and technical issues have raised in the process of international dispute settlement in recent years. Thus, the cases brought before international courts and tribunals have been increasingly focused on highly technical and scientific evidence.[186] Thus, those elements, evident from the experience with inter-State environment disputes, would typically require specialized expertise to contextualize or fully grasp the issues in dispute.

(3) There has been a noticeable change in the attitude of States and the International Court of Justice in recent cases involving the science-dependent issues of international environmental law, which certainly reflect, directly or indirectly, specific features of the settlement of disputes relating to the protection of the atmosphere.[187] For this reason, it would be necessary that, as underlined in paragraph 2 "due consideration" be given to the

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[183] C. Tomuschat, "Article 33", in *The Charter of the United Nations: A Commentary*, 2nd ed., vol. 1, B. Simma, (ed.) (Munich, Verlag C.H. Beck, 2002), pp. 583–594.

[184] N. Klein, "Settlement of international environmental law disputes", in *Research Handbook of International Environmental Law*, Fitzmaurice, Ong and Merkouris (eds.) (footnote 153 above), pp. 379–400; C.P.R. Romano, "International dispute settlement", in *The Oxford Handbook of International Environmental Law*, Bodansky *et al.* (footnote 19 above), at pp. 1039–1042.

[185] See S. Murase, "Scientific knowledge and the progressive development of international law: with reference to the ILC topic on the protection of the atmosphere", in *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz*, J. Crawford *et al.* (eds.) (Leiden, Brill Nijhoff, 2017), pp. 41–52.

[186] See the speech of the President of the International Court of Justice, Ronny Abraham, before the Sixth Committee on 28 October 2016 (on international environmental law cases before the International Court of Justice) (available at www.icj-cij.org/files/press-releases/0/19280.pdf); and President Peter Tomka, "The ICJ in the service of peace and justice – words of welcome by President Tomka", 27 September 2013 (available at www.icj-cij.org/files/press-releases/8/17538.pdf). See also E. Valencia-Ospina, "Evidence before the International Court of Justice", *International Law Forum du droit international*, vol. 1 (1999), pp. 202–207; A. Riddell, "Scientific evidence in the International Court of Justice — problems and possibilities", *Finnish Yearbook of International Law*, vol. 20 (2009), pp. 229–258; B. Simma, "The International Court of Justice and scientific expertise", *American Society of International Law Proceedings*, vol. 106 (2012), pp. 230–233; A. Riddell and B. Plant, *Evidence Before the International Court of Justice* (London, British Institute of International and Comparative Law, 2009), chap. 9.

[187] In the 1997 *Gabčíkovo-Nagymaros* (see footnote 76 above) and the 2010 *Pulp Mills* (see footnote 73 above) cases, the parties followed the traditional method of presenting the evidence, that is, by expert-counsel, though they were scientists and not lawyers. Their scientific findings were treated as the parties' assertions, but this met some criticisms by the Bench, as well as by commentators. Thus, in the *Aerial Herbicide Spraying* (withdrawn in 2013) (*Aerial Herbicide Spraying (Ecuador v. Colombia), Order of 13 September 2013, I.C.J. Reports 2013*, p. 278), the 2014 *Whaling in the Antarctica* (*Whaling in the Antarctica (Australia v. Japan; New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226) and the 2015 *Construction of a Road* (see footnote 82 above) cases, the parties appointed independent experts, who were, in the latter two cases, cross-examined and were treated with more weight than the statements of expert-counsel. In all of these cases, the Court did not appoint its own experts in accordance with Article 50 of its Statute, but it did so finally in the *Maritime Delimitation* case, although the latter was not *per se* an environmental law dispute (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Judgment (Merits), 2 February 2018, available at www.icj-cij.org/files/case-related/157/157-20180202-JUD-01-00-EN.pdf).

use of technical and scientific experts.[188] The essential aspect in this paragraph is to emphasize the use of technical and scientific experts in the settlement of inter-State disputes whether by judicial or other means.[189]

(4) In the context of judicial or arbitral process of settling disputes relating to the protection of the atmosphere, the principles of *jura novit curia* (the court knows the law) and *non ultra petita* (not beyond the parties' request) may become relevant, since the relationship between law and fact is a pertinent issue relating to scientific evidence.[190] The Commission however decided to maintain a simple formulation, and not to address these issues in the draft guideline, as originally proposed by the Special Rapporteur.[191]

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[188] See, D. Peat, "The use of court-appointed experts by the International Court of Justice", *British Yearbook of International Law*, vol. 84 (2014), pp. 271–303; J.G. Devaney, *Fact-finding before the International Court of Justice* (Cambridge, Cambridge University Press, 2016); C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge, Cambridge University Press, 2011), pp. 77–135; Special edition on courts and tribunals and the treatment of scientific issues, *Journal of International Dispute Settlement*, vol. 3 (2012); C. Tams, "Article 50" and "Article 51", in *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann *et al.* (eds.) (Oxford, Oxford University Press, 2012), pp. 1287–1311; C.E. Foster, "New clothes for the emperor? Consultation of experts by the International Court of Justice", *Journal of International Dispute Settlement*, vol. 5 (2014), pp. 139–173; J.E. Viñuales, "Legal techniques for dealing with scientific uncertainty in environmental law", *Vanderbilt Journal of Transnational Law*, vol. 43 (2010), pp. 437–504, at pp. 476–480; G. Gaja, "Assessing expert evidence in the ICJ", *The Law and Practice of International Courts and Tribunals*, vol. 15 (2016), pp. 409–418.

[189] It should be recalled that there are close interactions between non-judicial and judicial means of settling disputes. In the context of disputes relating to the environment and to the protection of the atmosphere, in particular, even at the stage of initial negotiations, States are often required to be well equipped with scientific evidence on which their claims are based, and accordingly the distance between negotiation and judicial settlement may not be very distant.

[190] The line between "fact" and "law" is often obscured (M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (The Hague, Kluwer Law International, 1996), pp. 42–49). Scientific issues are described by commentators as "mixed questions of fact and law" (e.g., C.F. Amerasinghe, *Evidence in International Litigation*, (Leiden, Martinus Nijhoff Publishers, 2005), p. 58), which cannot be easily categorized into either a matter of law or fact. Judge A. Yusuf stated in his declaration in the *Pulp Mills* case that the experts' role was to elucidate facts and to clarify the scientific validity of the methods used to establish facts or to collect data; whereas it is for the Court to weigh the probative value of the facts (*Pulp Mills* (see footnote 73 above), Declaration of Judge Yusuf, para. 10). See also Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (see footnote 188 above), pp. 145–147). Based on *jura novit curia*, the Court can in principle apply any law to any fact, and in theory can evaluate evidence and draw conclusions as it sees appropriate (as long as the Court complies with the *non ultra petita* rule); these are all legal matters. Given its judicial function and under *jura novit curia*, the Court needs to sufficiently understand the meaning of each related technical fact in the case at hand.

[191] The proposal by the Special Rapporteur read as follows: "It may be taken into consideration, as appropriate, in the judicial settlement of disputes relating to the protection of the atmosphere, that the principle of *jura novit curia* (the court knows the law) applies not only to law but also to facts, thereby requiring necessary assessment of scientific evidence, on the condition of not exceeding the scope of the dispute under the rule of *non ultra petita* (not beyond the request)." See the Special Rapporteur's fifth report (A/CN.4/711), para. 104.